HIGH COURT OF AUSTRALIA.

H. JONES AND COMPANY PROPRIETARY LIMITED AND OTHERS . . . PLAINTIFFS, } APPELLANTS;

AND

THE WARDEN, COUNCILLORS AND ELECTORS OF THE MUNICIPALITY OF KINGBOROUGH . . . . . DEFENDANT, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *March* 14-16.

MELBOURNE, *May* 16.

Latham C.J., Dixon and Fullagar JJ.

Water—Rights of riparian owners—Interference with flow of water by local authority—Power of local authority to control supply of water—Rivers vested in local authority—Application to local authority created after commencement of Act—Subsequent vesting in Hydro-Electric Commission—Implied repeal of earlier Act—Effect on prior riparian rights—"Rights directly granted by any Act"—Local Government Act 1906-1947 (*Tas.*) (6 *Edw. VII. No.* 31—11 *Geo. VI. No.* 61), *s.* 209—*Hydro-Electric Commission Act* 1929-1944 (*Tas.*) (20 *Geo V. No.* 83—7 & 8 *Geo. VI. No.* 95), *s.* 49—*Towns Act* 1934-1947 (*Tas.*) (25 *Geo. V. No.* 47—11 *Geo. VI. No.* 56), *s.* 37—*Hydro-Electric Commission Act* 1944-1948 (*Tas.*) (8 & 9 *Geo. VI. No.* 22—*No.* 9 *of* 1948), *s.* 65.

Referred to:- (1954) N.S.W. S.R. 131

Rejd. 92 C.L.R. 329.

Section 37 of the *Towns Act* 1934-1947 (Tas.) authorizes a council, subject to certain conditions, to take and divert from any lake, river, stream or creek flowing through or in the vicinity of a town a sufficient quantity of water for supplying the whole or any portion of the inhabitants of the town with water for domestic purposes and for supplying with water any public baths or washhouses or any fountains or pumps within the town, and for the purpose of providing a supply of water for the extinguishing of fires in the town, or for motive power or for supplying ships.

Held by the whole Court that this section does not authorize a council to take and divert water from a river in pursuance of a scheme for providing a supply of water for general purposes to two towns and a tract of country of about two miles in length lying between the two towns.

Section 209 of the *Local Government Act* 1906-1947 (Tas.) provides :—" The council of each municipality shall have the care, control, and management of every water district within the municipality which heretofore has been controlled and managed by the council of a rural municipality or other abolished local body, and in them shall be vested every river, creek, or watercourse within the limits of every such water district and not vested by statute in any other authority, or excepted from the operation of this Part by a notification of the Minister in the Gazette ; and subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river, creek, or watercourse, the council shall have the absolute control and regulation, so far as the same can be effected by artificial means, of the supply of water along and by every such river, creek, or watercourse within such limits. . . ." Section 65 of the *Hydro-Electric Commission Act* 1944-1948 (Tas.) provides :—" (1) Subject to rights lawfully held on the eighteenth day of January, 1930, the sole right to use waters in lakes, falls, rivers, or streams vested in the Commission by section forty-nine of the Hydro-Electric Commission Act 1929 shall be held by the Commission for the purposes of this Act. . . . (5) The provisions of this section shall not apply to or in respect of any rights directly granted by any Act." Section 67 provides that " the Commission shall, if the Governor so directs and subject to such conditions as the Governor may determine, permit any person to be designated by the Governor to use the water of any lake fall river or stream for any purpose other than the generation of electrical energy."

Held (1) by *Dixon* and *Fullagar* JJ. (*Latham* C.J. dissenting) that neither s. 49 of the *Hydro-Electric Commission Act* 1929-1944 nor s. 65 of the *Hydro-Electric Commission Act* 1944-1948 impliedly repealed or rendered inoperative the provisions of s. 209 of the *Local Government Act* 1906-1947.

(2) By the whole Court that the powers conferred upon a council by s. 209 of the *Local Government Act* 1906-1947 were not " rights directly granted by any Act " within the meaning of s. 65 (5) of the *Hydro-Electric Commission Act* 1944-1947.

(3) By *Dixon* and *Fullagar* JJ. (*Latham* C.J. dissenting) that s. 209 of the *Local Government Act* 1906-1947 applied to water districts proclaimed after the commencement of that section.

(4) By the whole Court that the Hydro-Electric Commission could, under s. 67 of the *Hydro-Electric Commission Act* 1944-1947, if so directed by the Governor, lawfully and effectively permit a council to take and use the water of a lake, fall, river or stream for the purpose of providing a supply of water in a water district under the *Local Government Act* 1906-1947.

The " previously existing rights " which are preserved to a riparian proprietor by s. 209 of the *Local Government Act* 1906-1947 are, or include, those rights to use the water of a river, creek or watercourse which he has at common law by virtue of his property in riparian land.

The plaintiff H. Jones & Co. Pty. Ltd. was the owner of certain lands on both banks of a river. It had for many years used the water of the river

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for domestic purposes and for the watering of stock and also for the purpose of irrigation. At certain times and under certain seasonal conditions its use of the water for irrigation was very extensive, and involved taking the whole or practically the whole of the water which came down to its land. The only lower riparian proprietors were the other two plaintiffs, who had also for many years used the water of the river for purposes of their own. One of those other plaintiffs used substantial quantities of water from time to time for the purpose of irrigation. The council of the defendant municipality had embarked upon a scheme of water supply to a water district duly constituted under Part XV. of the *Local Government Act* 1906-1947. The scheme involved the taking of water from the river at a point some distance above the plaintiffs' lands in such quantities as would sensibly diminish the flow of the stream and substantially interfere at times with the use which had been made of the water by the plaintiffs.

Held by *Latham* C.J. and *Fullagar* J. (*Dixon* J. dissenting) that the plaintiffs had " previously existing rights to the use of the water " in the way in which it had been used by them, that these rights were preserved by s. 209 of the *Local Government Act* 1906-1947, that the defendant's scheme would substantially interfere with those rights, and that an injunction should be granted to restrain the defendant from proceeding with the scheme.

Nature of riparian rights at common law, discussed.

Decision of the Supreme Court of Tasmania (*Morris* C.J.) reversed.

APPEAL from the Supreme Court of Tasmania.

H. Jones and Company Proprietary Ltd., Clement Edgar Worsley and Eugene Albert Klingler, who were the owners and occupiers of lands abutting on the North West Bay River, a natural stream flowing into D'Entrecasteaux Channel, brought an action against the Municipality of Kingborough alleging that the municipality threatened and intended wrongfully to obstruct the stream and to divert large quantites of water away from it thus depriving the lands of the plaintiffs of the flow of water to which they were entitled. The obstruction alleged consisted of a dam which was in course of construction across the bed of the stream above the lands of the plaintiffs from which the defendant intended by means of a pipe line to pump 260,000 gallons of water per day to a reservoir for the purpose of a scheme for the supplying of water to residents in the townships of Margate and Snug. The plaintiffs claimed :— (1) a declaration that they were respectively entitled to the North West Bay River, and to the waters flowing in a defined and natural channel into and forming part of the same as such stream and waters have been accustomed to flow down to their lands, subject only to the ordinary and reasonable use of the stream and waters by the

riparian owners higher up upon the stream; (2) a declaration that the works under construction by the defendant, and the scheme and undertaking proposed to be conducted by it for the diversion and supply of water from the stream to residents in the townships and districts of Margate and Snug, were contrary to the rights of each of the plaintiffs and (3) an injunction to restrain the defendant, its servants, agents or contractors from constructing the works or obstructing or diverting the water of the stream, so as to interfere in any manner with the rights of the plaintiffs.

By its defence the defendant pleaded (*inter alia*):—(1) That the plaintiffs had lost their common law rights as riparian owners in respect of the waters of the North West Bay River because in 1906 their predecessors had been paid compensation by the Corporation of the City of Hobart for loss of their riparian rights on the North West Bay River. (2) That by the *Hydro-Electric Commission Act* 1929-1944 (Tas.) the sole right to use water in rivers or streams was vested in the Hydro-Electric Commission, subject to any rights lawfully held at the commencement of the Act and to the right of any person for stock or domestic purposes. (3) That on 1st May 1947 the Governor declared by proclamation published in the *Gazette* that a tract of land including the land of the plaintiffs within the Municipality of Kingborough should be a water district called the Margate-Snug water district within the meaning and for the purpose of Part XV., of the *Local Government Act* 1906-1947 (Tas.). (4) That in pursuance of its powers and authorities under the *Local Government Act* 1906 in respect of the Margate-Snug water district the defendant was entitled to take and divert from the North West Bay River water for the inhabitants of the water district subject to the rights of the plaintiffs to take from the river such quantities of water as they or their respective predecessors in title took therefrom on 18th January 1930, or alternatively on 1st May 1947. (5) That the defendant was a municipality constituted under the *Local Government Act* 1906 and the *Towns Act* 1934 (Tas.) and the matters and things complained of were done by the defendant in the course of exercising its powers and authorities under those Acts in supplying from the North West Bay River flowing through or in the vicinity of towns of Margate and Snug a sufficient quantity of water for the inhabitants of the said towns for domestic purposes.

The defendant counterclaimed:—(1) a declaration that the waters of the North West Bay River within the water district were vested in the defendant; (2) a declaration that the plaintiff, H. Jones and Company Proprietary Limited, was not entitled to divert and take from the river any waters or, alternatively, any

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waters other than those required for the reasonable domestic needs of the plaintiff and the needs of the plaintiff's cattle and (3) an injunction to restrain the plaintiff its servants agents or contractors from diverting the water and from continuing so to do so as to interfere with the defendant's said rights.

By their reply the plaintiffs pleaded (*inter alia*):—(1) That the payment of compensation by the Corporation of the City of Hobart afforded no defence to this action but was limited to the interference by the Corporation with the flow of water in the river. (2) That by virtue of the *Hydro-Electric Commission Act* 1929 and the *Hydro-Electric Commission Act* 1944 the defendant had not at any material time any power under the *Local Government Act* 1906 or the *Towns Act* 1934 to interfere with the flow of water in the river or to interfere therewith so as in any manner to infringe the rights of the plaintiffs set out in the statement of claim, or to execute the works referred to in the statement of claim. (3) Alternatively, if and in so far as the defendant had acted or purported to act in pursuance of its powers and authorities under the *Local Government Act* 1906, the powers and authorities were by that Act made subject to the rights of the plaintiffs as riparian proprietors existing previously to the constitution of the water district referred to in the defence, and did not authorize any interference with the flow of water to through or past the lands of the plaintiff. (4) Further, and in the alternative, if and in so far as the defendant had at any material time any power under the *Towns Act* 1934 to do any of the acts complained of in the statement of claim, the defendant at no time acted in pursuance of any such power. (5) In the further alternative and in so far as the defendant acted pursuant to any power or authority under the *Towns Act* 1934: (a) the defendant had not obtained the consent of the Governor as required by that Act; (b) the defendant was not acting *bona fide* for the purposes specified in the *Towns Act* 1934 but for the purpose of instituting a supply of water to a water district constituted under the *Local Government Act* 1906; (c) by s. 37 of the *Towns Act* 1934 the power of the defendant was to take and divert from the river flowing through or in the vicinity of a town within the meaning of the Act a sufficient quantity of water for supplying the whole or any portion of the inhabitants of such town with water for the purposes therein specified, and for no other purposes. The scheme and works referred to in the statement of claim involved the supply of water for the towns of Margate and Snug, a fish cannery on North West Bay outside the boundaries of either town and numerous other

areas within the water district referred to in the defence, and for purposes not limited to the purposes specified in s. 37. The town of Margate was the only town through or in the vicinity of which the said river flowed. Accordingly, the scheme was in respect of areas, persons, and purposes not authorized by the section and was not authorized thereby.

By its defence to the counterclaim the plaintiff, H. Jones and Company Proprietary Limited, pleaded a prescriptive right to divert the waters of the river for the purpose of irrigating its hop-fields.

Morris C.J. held that whatever riparian rights were saved by the *Local Government Act* 1906, s. 209, they were at most rights diminished to the extent necessary to enable the defendant to supply water away from the banks of the stream and not return it to the stream; that the *Hydro-Electric Commission Act* 1944 s. 65 (5) meant only that the powers of the Hydro-Electric Commission to acquire rights compulsorily should not extend to rights which were the grant of the Act; that since s. 209 of the *Local Government Act* 1906 was a special provision enabling municipal councils to supply a most essential thing within the boundaries of their municipalities it was not repealed *pro tanto* by the Hydro-Electric Commission Acts; that the defendants might reduce the flow to the riparian owners to the extent necessary for it to carry out the purposes of the *Local Government Act* 1906, but not below the amount necessary for stock, domestic purposes and reasonable extraordinary user; and that the plaintiffs had not shown that the defendant's scheme would leave them without water for the purposes mentioned. His Honour, therefore, refused the declarations and injunctions sought by the plaintiffs, and declared on the counterclaim:—(1) that the waters of the North West Bay River within the Margate water district were vested in the defendant, and the plaintiff, H. Jones and Company Proprietary Limited, was not entitled to divert and take from the river any waters other than those required for stock and domestic purposes and reasonable extraordinary purposes.

From this decision the plaintiffs appealed to the High Court.

R. M. Eggleston, K.C. (with him *J. S. Blomfield*) for the appellants. The appellants' claim is based upon the common law right of riparian proprietors to the natural flow of the stream without sensible diminution. Section 209 of the *Local Government Act* 1906-1947 (Tas.) gives the respondent certain powers which we claim are subject to

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our riparian rights. The first question arising from this section is, does it apply to water districts created after the Act came into operation? We respectfully agree with the view of the learned trial judge that it does. If it does not, then there is nothing in the Act authorizing the respondent to interfere with the flow of water in the stream. It would be curious if a council taking over a previously existing water district and having the stream vested in it by s. 209 had to respect the rights of riparian owners and was unable to interfere with navigation, while a council having a new district could obstruct any navigation and override riparian rights without having anything vested in it. The next question is, what is meant by "subject to the previously existing rights of any riparian proprietors to the use of water"? I submit that it means subject to the rights, whatever they may be, and whether against an upper or a lower proprietor. The right of a lower proprietor against an upper proprietor can be defined only by reference to the flow of water in the stream. The flow of water is important to lower proprietors for various reasons, but the respondent, in effect, says—"so long as you have drinking water for yourself and your stock, we may reduce the flow to a mere trickle." This cannot be read into the words "subject to the previously existing rights of riparian proprietors." Even if s. 209 did not preserve the appellants' rights, I submit that the respondent is prevented from obtaining any control over rivers by s. 49 of the *Hydro-Electric Commission Act* 1929-1944 (Tas.) and s. 65 of the *Hydro-Electric Commission Act* 1944-1948 (Tas.). These sections leave no room for the vesting provisions of s. 209 of the *Local Government Act* 1906-1947 (Tas.), and the Hydro-Electric Commission takes subject to existing rights. It was clearly intended by the Act of 1929 that the Hydro-Electric Commission was to have complete control of the water resources of the State, see the long title, and ss. 49-51, 78. These provisions were re-enacted in 1944 with the addition of s. 48. Despite such complete control the Acts did not interfere with riparian rights; the commission was required to purchase any rights that it needed. The *Local Government Act* 1906-1947 had already provided for water districts, and the *Water Sewerage and Drainage Board Act* 1944 (Tas.) clearly makes water districts subject to the consent of the Hydro-Electric Commission. Section 67 of the *Hydro-Electric Commission Act* 1944-1947 limits the grant of permission to the extent to which the right is vested in the Commission. The evidence shows that the approval of the Water Sewerage and Drainage Board and the Hydro-Electric Commission was subject to the respondent settling

the question of riparian rights. The limitation of riparian rights to stock and domestic user overlooked the possibility of storage in seasons of ample supply; there was no need to postulate that supply by the respondent was impossible unless the rights of riparian owners were cut down. The learned trial judge thought it strange if, having cut down riparian rights by s. 209 the legislature restored them by the *Hydro-Electric Commission Acts*, but (a) the *Hydro-Electric Commission Acts* clearly do take away the councils' control, and this view is confirmed by the *Water Sewerage and Drainage Board Act*, 1944 s. 8 (7), (b) special Acts are needed to empower a council to take water from a stream, see, for example, the *Carrick Water Act*, 1947, the *Mole Creek Water Act*, 1946, the *Beaconsfield Water Act* 1938; (c) the strangeness of the situation disappears when it is assumed that the *Local Government Act* 1906-1947 never did give a council power to override riparian rights. If our construction of the *Local Government Act* 1906-1947 is correct the defence fails. But if the view of the learned trial judge is correct, then the question is whether that Act is repealed *pro tanto* by the *Hydro-Electric Commission Acts*. This is not a case of a special Act followed by a general Act, which was the view held by the learned trial judge. It is submitted that the *Local Government Act* 1906-1947 is general in its application to the subject of water as well as to local government, while the *Hydro-Electric Commission Act* 1929-1944 is special in its application to water, and, therefore, it impliedly repeals the former Act. As to the counterclaim, this depends on the vesting claimed by s. 209, but (a) the fact that the Hydro-Electric Commission has exclusive use under its Act left nothing to vest in the respondent when the water district was established in 1947; (b) in any event, as already submitted, s. 209 has been repealed by implication; (c) the second declaration should not have been made because the respondent has no right of enjoyment, and therefore, no title to restrain the enjoyment of another; (d) the appellant company has established on the evidence a prescriptive right to draw water through the race.

H. S. Baker and *R. C. Wright*, for the respondent.

H. S. Baker. The evidence shows that there is sufficient water for all parties; the daily flow varies from 1,600,000 gallons to over 3,000,000 gallons, of this appellant company consumes 900,000 gallons, the appellant Klingler 144,000 gallons and the appellant Worsley, an insignificant amount, while the respondent's scheme

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would consume a maximum of 253,000 gallons. As to the amount of water to which the appellants may be regarded as justly entitled see *Halsbury's Laws of England*, 2nd ed., vol. 33, pp. 593-601; *Embrey* v. *Owen* (1); *Sampson* v. *Hoddinott* (2); *Moore* v. *Corrigan* (3); *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (4); *Sharp* v. *Wilson, Rotheray and Co.* (5); *Earl of Sandwich* v. *Great Northern Railway Co.* (6); *Orr Ewing* v. *Colquhoun* (7). Sections 49 and 65 of the *Hydro-Electric Commission Acts* must be construed in the light that they grant to the Commission the sole right of user for hydro-electric purposes, the only rights that are saved are those which conflict with a grant of that nature: *Beal's Cardinal Rules of Legal Interpretation*, 3rd ed. (1924) p. 303; *R.* v. *Dibdin* (8). Part XV. of the *Local Government Act* 1906-1947 has the effect of abolishing the appellants' riparian rights at common law and substituting statutory rights. Section 209 need not be restricted to a previously existing water district because ss. 206 and 207 have provided for the establishment of new water districts. The vesting of rivers &c. in the municipality by s. 209 is sufficient in itself to destroy common law rights. *Hanson* v. *The Grassy Gully Gold Mining Co.* (9) and *Cook* v. *Vancouver Corporation* (10) show that a vesting of property in A may destroy the rights of all others in the property. What it preserves is "the right to use"; this is not defined, it is a relative thing to be determined by the circumstances. The effect of the legislative scheme is to provide for the control of the entire stream and the distribution of its waters, under which the appellants may be better off than if there were no control. [He referred to *Maxwell* on *Interpretation of Statutes*, 9th ed. (1946) p. 163 and *Jennings* v. *Kelly* (11).] The *Hydro-Electric Commission Acts* of 1929 and 1944 are concerned only with the generation of electrical energy, they contain no provision for the supply of water to the public, therefore, those Acts and the *Local Government Act* 1906-1947 are concerned with two entirely different uses of water and can live together. The "rights" preserved by s. 65 (1) of the *Hydro-Electric Commission Act* 1944-1948 are perfectly general, they are not confined to riparian rights. Whatever construction may be placed upon the introductory words of s. 65 (1) they should not be construed so as to enlarge existing rights, or to create any immunities, or to destroy

(1) (1851) 6 Ex. 353 [155 E.R. 579].
(2) (1857) 1 C.B. (N.S.) 590 [140 E.R. 242].
(3) (1949) Tas. L.R. 34.
(4) (1875) L.R. 7 H.L. 697.
(5) (1905) 93 L.T. 155.
(6) (1878) 10 Ch. D. 707.
(7) (1877) 2 App. Cas. 839.
(8) (1910) P. 57.
(9) (1900) 21 N.S.W.L.R. 271, at p. 275; 17 W.N. 187.
(10) (1914) A.C. 1077, at p. 1081.
(11) (1940) A.C. 206, at p. 229.

any governmental power in relation to such rights; at best they preserve the status quo, whatever that may be. The rights arising on the proclamation of a water district are " rights directly granted by any Act " within the meaning of s. 65 (5). [He referred to *Maxwell* on *Interpretation of Statutes*, 9th ed. (1946), p. 193; *R.* v. *Minister of Health*; *Ex parte Villiers* (1); *Blackpool Corporation* v. *Starr Estate Co. Ltd.* (2).]

The *Local Government Act* 1906-1947 is a special Act: *Beal's Cardinal Rules of Legal Interpretation*, 3rd. ed. (1924), p. 433; *Ashton-under-Lyne Corporation* v. *Pugh* (3); *North Level Commissioners* v. *River-Welland Catchment Board* (4); *Maxwell* on *Interpretation of Statutes*, 9th ed. (1946), p. 173; *Halsbury's Laws of England*, 2nd ed., Vol. 31, p. 561; *R.* v. *Connell* (5).

R. C. Wright. Section 37 of the *Towns Act* 1934-1947 is the respondent's direct source of power for establishing the scheme, and the consent of the Governor is not required until the time for taking the water has actually arrived. Any injunction that may be granted should leave room for the consent of the Governor. Three aspects of the *Hydro-Electric Commission Act* 1944-1948 have peculiar force in relation to the *Towns Act* 1934-1947. (1) The vesting of the sole right to use waters under s. 65 (1) of the Act of 1944 is subject to the power created by s. 37 of the *Towns Act* 1934-1947. (2) This power is a right " directly granted by any Act " within the meaning of s. 65 (5). (3) Section 43 of the *Towns Act* 1934-1947 confers upon a member of the public a clear right to the supply of water for domestic purposes. Cf. *Coulson and Forbes* on *Waters and Land Drainage*, 5th ed. (1933), p. 348; that is the right which is preserved by s. 68 of the *Hydro-Electric Commission Act* 1944-1947; on the basis of the appellants' argument s. 68 is unnecessary: *West Surrey Water Company* v. *Guardians of Chertsey Union* (6); *Southport Corporation* v. *Attorney-General* (7). Section 68 does not primarily look at riparian rights at all. The respondent's water scheme is authorized by the *Towns Act* 1934-1947 because the evidence shows that the North West Bay River is the only feasible source of water supply for Margate and Snug. As to the counterclaim, s. 209 of the *Local Government Act* 1906-1947 vests the property in the banks and bed of the stream, or it vests the control and management of the stream for the purposes of water supply: *Coulson and Forbes* on *Waters and Land Drainage*,

(1) (1936) 2 K.B. 29, at p. 45.
(2) (1922) 1 A.C. 27, at pp. 34, 38, 39.
(3) (1898) 1 Q.B. 45.
(4) (1938) Ch. 379, at p. 394.
(5) (1944) 69 C.L.R. 407, at p. 418.
(6) (1894) 3 Ch. 513.
(7) (1924) A.C. 909.

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5th ed. (1933), pp. 79 and 82; *Halsbury's Laws of England*, 2nd ed. vol. 16, p. 248; *Mayor &c. of Tunbridge Wells* v. *Baird* (1); *Medway Co. v. Romney (Earl)* (2). In reply to the appellants' contention that the vesting is subject to the riparian rights, we submit that the vesting is absolute but the administration by the respondent of the property vested is subject to the right of riparian owners to have water. An easement by prescription is claimed by the appellant company upon the doctrine of a lost modern grant on the basis that the right is established against the lower riparian owners; nothing is said as to riparian owners above the appellant company. The appellant company cannot maintain a prescriptive right in respect of the water they are using because: (1) the evidence shows that the quantity taken has varied over the years; (2) the alterations in the position of the intake have been sufficiently material as to prevent the prescription of an easement; (3) they must show affirmatively that the user was known to the owners of the servient tenements.

R. M. Eggleston, K.C. in reply. The respondent's water scheme goes beyond that permitted by s. 37 of the *Towns Act* 1934-1947. As to quantity of water abstracted on the evidence the conclusion is inevitable that the scheme will interfere with the appellants' user. There is nothing in the *Local Government Act* 1906-1947 to support the contention that the appellants' common law rights are converted to statutory rights. Future rights arising from the proclamation of a water district can hardly be "rights directly granted by any Act" within the meaning of s. 49 (5) and 65 (5) of the *Hydro-Electric Commission Acts*.

Cur. adv. vult.

The following written judgments were delivered:—

May 16.

LATHAM C.J. The three appellants are plaintiffs in an action in which they claim as against the defendants, the Warden, Councillors and Electors of the Municipality of Kingborough (to whom I shall hereafter refer as the municipality) a declaration that they as riparian owners of land upon the North West Bay River are entitled to the accustomed flow of the stream subject only to the ordinary and reasonable use of the stream and waters by the riparian owners higher up upon the said stream. They further claim a declaration that certain works under construction by the defendant and a proposed scheme for supply of water to the respondents

(1) (1896) A.C. 434, at p. 442.

(2) (1861) 9 C.B. (N.S.) 575 [142 E.R. 226].

in the townships and districts of Margate and Snug are contrary to the rights of the plaintiffs, and a consequential injunction. This claim was dismissed by the Supreme Court of Tasmania (*Morris* C.J.). The municipality counterclaimed as against the plaintiff H. Jones & Co. Pty. Ltd. for a declaration that the waters of the river within the water district which was managed and controlled by the defendant were vested in the defendant and for a declaration that the plaintiff H. Jones & Co. Pty. Ltd. was not entitled to divert and take any water at all from the river or, alternatively, any water other than what was required for the domestic needs of the said plaintiff and its cattle. An injunction was also claimed. Upon the counterclaim the learned Chief Justice gave judgment for the defendant for declarations as sought but declined to grant an injunction because it was not shown that the plaintiff company's use of the water could have any effect in relation to the defendant or its water scheme.

The plaintiffs appeal from the judgment upon both claim and counterclaim.

The North West Bay River is a small stream rising on the slopes of Mt. Wellington and flowing into D'Entrecasteaux Channel, some miles below the city of Hobart. The plaintiffs are owners of land upon the banks of the river. H. Jones & Co. Pty. Ltd. owns land on both sides of the river. The plaintiff C. E. Worsley owns land below and adjoining that of the company on the south side of the river, and the plaintiff E. A. Klingler owns land adjoining that of the plaintiff Worsley on the same side of the river. The plaintiff Klingler's land runs down to the mouth of the river. The owner of the land on the north side of the river opposite the lower portion of Klingler's land is not a party to the proceedings.

The flow of the stream in the dry months, December to March, is often very low and sometimes almost ceases. Under the *Hobart Water Act* 1905 (Tas.), the Municipal Council of the City of Hobart has the right to take half the water of the stream at a point higher than the defendant's weir and the exercise of this right necessarily diminishes the flow of the stream. The flow of the stream was measured in February and April 1949 at the defendant's weir and it was found that the flow varied from 1,600,000 gallons a day to more than 3,000,000 gallons a day. In a dry summer the flow would be much less.

The municipality has constructed a weir across the river at a point about one and a half miles above the land of the plaintiff company and proposes to take water at the weir to supply the towns of Margate and Snug and adjoining districts and in particular to

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supply the needs of a fish canning company which has established a factory on the sea-shore, not on the bank of the river. The town of Margate is close to the river and the town of Snug is a few miles from the river. The water scheme of the defendant municipality is devised to supply not only these towns, but also persons who are resident in the areas in the vicinity of the towns. The defendant's scheme for the supply of water provides for the immediate use of about 128,000 gallons per day and ultimately, in (it is said) about 25 years, for the use of 253,000 gallons per day.

The plaintiff company takes water from the stream at three points—at a weir whence the water runs through a four-inch pipe over land formerly owned by one McGuire but now owned by P. J. Worsley, over which land the company has an easement, at a weir higher up the stream, and by a pump on its own land on the north bank. This water is used for the purposes of irrigating hops, for domestic supply and for some 600 sheep and a few cattle and milking cows. The plaintiff company now irrigates about 55 acres and uses about 900,000 gallons a day when the water is so used. The plaintiff Worsley uses the water only for domestic and stock purposes. The plaintiff Klingler uses the water for the purpose of irrigating a seed farm, each irrigation involving the consumption of between 30 and 40 thousand gallons per day, but it is only occasionally that the plaintiff Klingler irrigates his farm. The evidence shows that none of the water used for irrigation is returned on the surface to the stream.

The plaintiffs complain that the proposed water scheme of the municipality will deprive them of a quantity of water to which they are entitled as riparian proprietors. The defendant municipality in the first place alleges that the plaintiffs or their predecessors in title have been paid compensation for loss of their riparian rights. Secondly, the defendant municipality claims that it is entitled to take water from the stream for the purpose of supplying it to consumers under both the *Towns Act* 1934 (Tas.), s. 37, as a council, and under the *Local Government Act* 1906 (Tas.), s. 209, as a council having the care, management and control of a water district. The plaintiffs reply that the compensation was paid and received under the *Hobart Water Act* 1905 in respect of prejudice to riparian rights by reason of the Hobart Town Council taking water and that such compensation bears no relation to any action of the defendant which diminishes the remaining flow of the river. This answer is decisive and I say no more about this particular defence. To the defence based upon the powers of the defendant under the *Towns Act* the plaintiffs reply that those powers are

limited to the supply of towns with the consent of the Governor and that the consent of the Governor has not been obtained and, further, that the proposals of the defendant extend beyond the towns of Margate and Snug. The plaintiffs also rely upon a provision in the *Towns Act* 1934, s. 37, that the powers conferred upon the council are " subject to the provisions of any law determining the rights of the Crown and of riparian proprietors in the waters and bed of any lake, river, stream, or creek." As to the *Local Government Act* 1906 the plaintiffs contend that s. 209, upon which the defendant relies, does not apply to the council because the water district through which the river runs and of which the council has the care, management and control was constituted only on 7th May 1947 and was not a water district which " heretofore had been controlled and managed by the council." Further, the plaintiffs rely upon the express provision in s. 209 that the right of the council to control and regulate the supply of water under that section is " subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river, creek, or watercourse," i.e. in any river &c. within such a water district.

The plaintiffs also rely upon the *Hydro-Electric Commission Act* 1929 (Tas.), s. 49, and the *Hydro-Electric Commission Act* 1944, (Tas.), s. 65. The plaintiffs contend that these Acts, which were passed after the *Local Government Act* 1906, vest the sole right to use water in rivers in Tasmania in the Hydro-Electric Commission subject (in the 1929 Act), however, " to any rights lawfully held at the commencement of the Act," that is the Act of 1929, and subject to a corresponding limitation contained in the consolidating Act of 1944. The plaintiffs contend that their rights as riparian proprietors were expressly protected under both the *Local Government Act* and the *Hydro-Electric Commission Acts*.

The *Towns Act* 1934, s. 37, is in the following terms :—" The council at any time, with the consent of the Governor and subject to the provisions of any law determining the rights of the Crown and of riparian proprietors in the waters and bed of any lake, river, stream, or creek, may take and divert from any lake or from any river, stream, or creek flowing through or in the vicinity of the town a sufficient quantity of water for supplying the whole or any portion of the inhabitants of the town with water for domestic purposes, and for supplying with water any public baths or washhouses, or any fountains or pumps within the town, and for the purpose of providing a supply of water for the extinguishing of fires in the town, or for motive power, or for supplying ships."

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The council is entitled under this section to take and divert water from a stream flowing through or in the vicinity of a town in order to supply the whole or a portion of the inhabitants of the town with water for the purposes mentioned in the section. But the council can do this only with the consent of the Governor. The consent of the Governor has not been obtained and upon this ground the learned Chief Justice held that the council was not able to exercise any of the powers vested in it by s. 37. The council in fact applied for the consent of the Governor but the Governor withheld consent pending the result of this litigation. In my opinion the absence of the consent of the Governor does not constitute an answer to the claim of the council that it is entitled to proceed with the scheme. There is nothing to show that the council has any intention of proceeding without the consent of the Governor and if the absence of consent at the present stage were the only obstacle to the course of action proposed by the council an injunction could be granted restraining the council from proceeding without the consent of the Governor.

The next objection to the contention of the council that it is authorized to proceed with the water scheme under s. 37 of the *Towns Act* is that, as is plainly the case, the council proposes to do more than supply the whole or any section of the inhabitants of the towns of Margate and Snug with water. The evidence shows that the council proposes to supply surrounding districts which are certainly not part of the small towns of Margate and Snug and further that it is proposed to supply a fish cannery which is situated in neither of these towns. The *Water, Sewerage and Drainage Board Act* 1944 (Tas.), s. 8 (3), provides that a local authority (which means a municipal council—s. 2) shall not proceed with the construction of any works to which this Act applies until the Water, Sewerage and Drainage Board has signified its approval of the scheme for the construction thereof. The defendant has applied for and received in May 1946 the approval of the Board. The correspondence between the defendant and the Board shows that the supply of water to the fish cannery is one of the principal objects of the scheme. Upon these grounds I am of opinion that the council is unable to justify its proposed procedure under the *Towns Act*. I therefore find it unnecessary to determine to what extent the plaintiffs are protected by the fact that this exercise of the power of the council under s. 37 is "subject to the provisions of any law determining the rights of riparian proprietors."

The *Local Government Act*, s. 209, is in the following terms:—"The council of each municipality shall have the care, control

and management of every water district within the municipality which heretofore has been controlled and managed by the council of a rural municipality or other abolished local body, and in them shall be vested every river, creek, or watercourse within the limits of every such water district and not vested by statute in any other authority, or excepted from the operation of this Part by a notification of the Minister in the *Gazette*; and subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river, creek, or watercourse, the council shall have the absolute control and regulation, so far as the same can be effected by artificial means, of the supply of water along and by every such river, creek, or watercourse within such limits. But nothing herein contained shall empower the council to place any obstruction in any navigable river, or to divert the water therefrom in any manner that would interfere with the navigation thereof."

The council claims to be entitled to proceed under this section with its scheme for water supply because it has the care, control and management of the Margate and Snug water district. The water district, however, of which by virtue of s. 209 a council has the care, control and management under the section is a water district within the municipality " which heretofore has been controlled and managed by the council." The Margate and Snug water district was constituted on 7th May 1947 and therefore was not a water district which " heretofore " (that is before the enactment of the *Local Government Act* 1906) had been controlled and managed by the council. The section vests in the council every river etc. within the limits of " every *such* water district " if not vested in some other authority or excepted by notification of the Minister. Similarly the provision that the council shall have the absolute control and regulation by artificial means of the supply of water is declared to be subject to the previously existing rights of any riparian proprietor to the use of the water flowing " in any such river, creek or watercourse." The provisions of s. 206 with respect to petitions for the constitution of a water district show that Parliament did not think that it was limiting the application of the Act to water districts which had existed before the enactment of the 1906 Act. If the words of s. 209 were uncertain in meaning a court would be justified in resolving the uncertainty by a reference to the intention of Parliament disclosed in s. 206. But there is no uncertainty of meaning in the word " heretofore " and that word cannot possibly be regarded as a misprint or clerical error. It is highly probable that the legislature has not said what it meant

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to say, but the function of a court is limited to interpreting and applying what the legislature has in fact said, whether it meant to say it or not. In my opinion a court has no authority to assume the function of correcting Acts of Parliament. Section 209 quite distinctly and most precisely confers powers upon councils in respect only of streams in water districts which before the enactment of the Act had been controlled and managed by the council. The court must take the provisions of the statute as it finds them and cannot amend the statute in order to accord with what is thought to be, however reasonably, the real intention of Parliament. All the provisions of s. 209 apply only to rivers &c. in a water district which was controlled and managed by a council before the enactment of the *Local Government Act* 1906. As the Margate and Snug water district was constituted after that Act, s. 209 confers no rights upon the council of the defendant municipality. If this interpretation of s. 209 is correct the matter requires the attention of the legislature.

The learned Chief Justice felt himself able to hold that the section should be construed as applying to water districts constituted after the enactment of the Act and I proceed to consider the case for the plaintiffs upon the assumption that the opinion which I have just stated as to the effect of s. 209 is not correct. The control and regulation of rivers &c. which s. 209 gives to the council is " subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river " &c. The plaintiffs are riparian proprietors upon the North West Bay River. Therefore the control and regulation which is given to the council by s. 209 is subject to their previously existing riparian rights. The council, it may be observed, is not itself a riparian proprietor and has no riparian rights. Its rights are entirely statutory. It is necessary, therefore, to enquire what were the existing rights of the plaintiffs to the use of the water in the stream. The answer will be the same whether the question is asked in respect of the date when the *Local Government Act* 1906 came into operation or in respect of the date when the water district was constituted. The riparian rights of the plaintiffs are natural rights derived from their ownership of land on the bank of the river and they as such owners have succeeded to the riparian rights of any prior owners.

Every riparian owner, in the absence of a prescriptive right to the contrary whereby his land has become a servient tenement, has the right " to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing

water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to form a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court": *Stollmeyer* v. *Trinidad Lake Petroleum Company* (1), quoting from *Young & Co.* v. *Bankier Distillery Co.* (2). Thus a riparian proprietor is entitled to the undiminished flow of the stream and to the use of the waters of the stream for ordinary domestic purposes, for cleaning and washing, and supplying drinking water to cattle. A riparian proprietor also has a right to use water for irrigation, a right which has been called in a number of cases a right to a reasonable "extraordinary use" of water. As to whether consumption of water by irrigation is an ordinary use, which can be exercised without limit, or an "extraordinary" use which can be exercised only to a "reasonable" degree according to the circumstances of the case, see the discussion in *Goddard* on *Easements*, 8th ed. (1921), pp. 369, 370. The latter is the view which has the better support. It is more favourable to the defendant than the other view, and I assume it to be correct for the purposes of this judgment.

In *Embrey* v. *Owen* (3), the court explained the nature of the riparian right to have a stream of water flow in its natural state without diminution or alteration as being an incident to the property in riparian land. This right, however, was subject to the like right of other proprietors. It was recognized (4) that many uses of water consumed some of the water. In Australia the use of water for irrigation very frequently uses up all the water which is taken out of a stream for that purpose. In the present case, for example, none of the water which is used for irrigation by the two plaintiffs who irrigate, namely the company and Klingler, is returned to the stream. In *Embrey* v. *Owen* (5) it is said that the law in England was not clear as to the extent of user by way of irrigation which would be permitted and *Parke* B. (6) added, "nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the

(1) (1918) A.C. 485, at pp. 491-492.
(2) (1893) A.C. 691, at p. 698.
(3) (1851) 6 Ex. 353 [155 E.R. 579].
(4) (1851) 6 Ex., at p. 370 [155 E.R. at p. 586].
(5) (1851) 6 Ex., at p. 371 [155 E.R., at p. 587].
(6) (1851) 6 Ex., at pp. 371, 372 [155 E.R., at p. 587].

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river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be probibited by law. If so, it was no infringement of the plaintiffs' right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream." In *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (1), *Cairns* L.C. stated the law in the same way:—"Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and

(1) (1875) L.R. 7 H.L., at p. 704.

the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before."

In the present case it is unnecessary to seek to determine the precise extent of the rights of a riparian proprietor to use water for irrigation and thereby to consume the water. The plaintiffs undoubtedly have a right to use at least some of the water for irrigation. The council proposes to take water from a point higher up the stream. It is therefore immaterial, in these proceedings, to consider how much the plaintiffs take or are entitled to take for irrigation. Only proprietors lower than the plaintiffs could have a right to complain of excessive user by the plaintiffs for irrigation. In the present case the plaintiffs own the banks of the river on the south side right down to its mouth and on the north side almost to its mouth. There are no objections in these proceedings by lower owners to the use which any of the plaintiffs make of the water for irrigation.

The rights of the plaintiffs which are preserved by s. 209 are rights to use the water of the stream. A right to use the water of a stream (and all the water thereof if that can lawfully be done) is illusory if the flow of the stream can be diminished at will by another person. A positive right in a landowner to the use of the water of a stream prima facie involves a right to prevent such interference with the stream as would prevent him from using the water. The right to use water for irrigation (subject to objection, if any, by lower proprietors—but here there is no such objection) may be described as a secondary right, the primary right being to have the flow of the stream without sensible diminution. But the secondary right cannot be severed from the primary right as if it were completely separate from and independent of it. If one person took the whole of the water, though his right to the water was subject to the rights of riparian owners to the use of the water, it would be no answer to a complaint of those owners that they could use the water, but that, unfortunately for them, there was no water for them to use because it had all been taken by the person who had the right to take water subject to their rights to use it. The rights of the plaintiffs are to have the water of the stream come to them in quantity and quality not sensibly diminished or altered and to use the water for domestic and stock purposes and, at least to some extent, for irrigation. Those are the rights which are preserved by s. 209. The subtraction of 128,000 gallons a day, or of a larger quantity up to 253,000 gallons a day, would sensibly diminish the flow of the stream, particularly in a dry season, and would decrease the amount of water available for irrigation. Therefore

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the establishment of the council's water scheme would interfere with the riparian rights which are preserved to the plaintiffs by s. 209.

Even if the plaintiffs had been taking too much water from the stream as against lower riparian owners their rights as riparian proprietors against higher riparian owners or other persons would not be affected. Excessive user by a lower owner affords no excuse for wrongful diversion by an upper owner. That this is the law was expressly decided in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (1). The law must be the same where a statutory power to take water is given subject to the riparian rights of landowners.

The learned Chief Justice held that the riparian rights of the plaintiffs which are protected by s. 209 must be limited in order to secure the objects of the *Local Government Act* in conferring rights upon councils to provide a supply of water to the inhabitants of a water district and accordingly his Honour took the view that, whatever riparian rights were preserved, they were at most " rights diminished to the extent necessary to enable the council to supply water away from the banks of the stream and not return it to the stream." With much respect to his Honour, it appears to me that this interpretation of s. 209 makes riparian rights subject to the exercise of the power of the council to supply water, whereas the section provides that the exercise of the power given to the council is to be subject to the riparian rights of persons who own land on the banks of the river. Further, there is no reason to assume that there are not many cases where there are no riparian rights which would prevent the effective operation of a scheme for water supply. Where it has been thought that further powers than those conferred under the *Towns Act* and the *Local Government Act* are necessary or desirable special Acts have been enacted, e.g. *Beaconsfield Water Act* 1938, *Mole Creek Water Act* 1946. These Acts are much more complete and effective in their provisions than those contained in the *Towns Act* and the *Local Government Act*. They expressly provide that a council may compulsorily acquire water rights and that it may divert water even though land is injuriously affected thereby, in either case upon the payment of compensation.

In my opinion if the only statutes to be considered were the *Towns Act* 1934 and the *Local Government Act* 1906 the plaintiffs would be entitled to the declarations claimed.

(1) (1875) L.R. 7 H.L. 697.

It is, however, necessary also to consider the provisions of the *Hydro-Electric Commission Acts* 1929 and 1944. The former Act was entitled—"An Act to provide for the Establishment of a Commission to manage and control the State Hydro-Electric Works; and to provide for State Control of all Waters in Lakes, Falls, Rivers and Streams, and to vest such Control in the said Commission; to empower the said Commission to regulate the use of such Waters in certain cases." The provisions of the Act carry out the objects stated in the title. Section 49 is as follows :—

"(1) Subject to any rights lawfully held at the commencement of this Act, the sole right to use water in lakes, falls, rivers, or streams shall vest in the Commission, and such sole right shall be held by the Commission for the purposes of this Act.

(2) The Commission, with the consent of the Minister, may purchase existing rights to the use of water in lakes, falls, rivers, or streams.

(3) The Commission, in the prescribed manner and with the consent of the Governor in any case, may acquire compulsorily, existing rights to the use of water in lakes, falls, rivers, or streams.

(4) Compensation shall be paid by the Commission in respect of such acquisition in the manner provided by, and subject to the provisions of, Part XI.

(5) The provisions of this section shall not apply to or in respect of any rights directly granted by any Act."

(Section 49 was repeated in the 1944 Act with an amendment which will be mentioned later). Section 49 is a general provision which, subject to any rights lawfully held at the commencement of the Act, vests the sole right to use waters in rivers and streams throughout Tasmania in the Commission. These words are not ambiguous and in my opinion they have the effect (whatever speculation may be made as to supposed intentions of Parliament) of repealing s. 209 of the *Local Government Act*. The whole of Tasmania is divided into municipalities. Section 209 vested in councils within whose areas water districts are constituted all the waters in rivers and streams in the water districts with the exceptions stated in the section. But the *Hydro-Electric Commission Act* 1929, s. 49 (1), quite clearly gives the sole right to use such water to the Hydro-Electric Commission, subject only to rights lawfully held at the commencement of the Act. Section 49 (2) and (3) shows that the Commission may acquire by agreement or compulsion any of the rights to which its sole right is declared to be subject in sub-s. (1).

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Section 49 (5) provides that "The provisions of this section shall not apply to or in respect of any rights directly granted by any Act." It is argued for the defendant that s. 209 of the *Local Government Act* is a direct grant of the rights to councils. In my opinion that is not the case. Section 49 (5) refers to a direct grant by an Act. In my opinion this provision can apply only where it is possible to specify a lake, fall, river or stream and to identify a particular grantee as being given directly by a statute a right in respect of the water in that lake &c. In 1929 the water district of Margate and Snug did not exist. Accordingly s. 209 had not come into operation in respect of any streams within the limits of the defendant municipality. Therefore it is not possible upon any view of s. 49 of the *Hydro-Electric Commission Act* 1929 to hold that the council held any rights at the commencement of that Act in the North West Bay River. Section 209 creates a power, not a right, though the exercise of a power may bring about the creation of a right.

In my opinion s. 49 (5) has the effect only of preventing the compulsory acquisition of rights by the Hydro-Electric Commission when there has been a direct statutory grant to an identifiable grantee of rights in respect of water in an identifiable lake, river &c.

It was held in the Supreme Court that the *Hydro-Electric Commission Act* was a general Act dealing with water and that the relevant provisions contained in Part XV. of the *Local Government Act* 1906 relating to water districts were special provisions dealing with the rights or powers of councils in respect of water. The maxim *generalia specialibus non derogant* was applied, with the result that the *Hydro-Electric Commission Act* 1929 was held not to supersede or modify in any way the relevant provisions of the *Local Government Act*. In my opinion both Acts are general Acts and the maxim is not applicable. The *Local Government Act*, Part XV., which contains s. 209, cannot be regarded as an exception to the general provisions of the *Hydro-Electric Commission Act*. Both Acts apply substantially to the streams &c. and they are inconsistent with each other. The *Local Government Act* is an Act dealing generally with local government in many aspects and the later *Hydro-Electric Commission Act* is, as its title declares, a general Act intended to vest the sole right to use water in lakes &c. in a Commission. The *Hydro-Electric Commission Act* is intended to deal generally with the subject of public control of water. This is shown by the fact that it is in this Act that a provision is contained (s. 50 in the 1929 Act and s. 66 in the 1944

Act) preventing the acquisition of water rights by any presumption of a lost grant. So also s. 51 (s. 67 in the 1944 Act) provides that to the extent to which the right to the use of the water in any lakes &c. is vested in the Commission, the Commission, if the Governor so directs, and subject to such conditions as the Governor may determine, shall permit any person to be designated by the Governor to use such water for any purpose. It should be noted that permission under this section is a permission to use water "for any purpose." These general words include the supply of water to the inhabitants of a water district, and therefore such permission is necessary before the council can exercise any powers which it may possess under any other statute so to supply water. Thus the *Hydro-Electric Commission Acts* show by their terms that they were intended to prevail over other statutes except in cases of direct statutory grants. The council has in fact applied to the Commission on 25th September 1945 for permission to use water for its intended scheme and the Commission consented to such use, but by a letter dated 9th April 1946 has made that consent subject to any riparian rights lawfully held on 18th January 1930 —a plain reference to the introductory words of s. 65 (1) of the *Hydro-Electric Commission Act* 1944 which re-enacts, with an amendment introducing the date mentioned, s. 49 (1) of the Act of 1929.

If then the plaintiffs lawfully held any rights at the commencement of the *Hydro-Electric Commission Act* 1929 the right of the Hydro-Electric Commission to use water in rivers &c., and any right of the council to use such water which was based upon permission from the Commission to use that water for the purpose of the supply of water to the inhabitants of a water district, were subject to such rights of the plaintiffs. Those rights have already been defined in what I have said and neither the council nor the Hydro-Electric Commission can do anything to interfere with the enjoyment of those rights.

The *Hydro-Electric Commission Act* 1929 was repealed and in substance re-enacted with some additions by the *Hydro-Electric Commission Act* 1944. In the 1944 Act the title of the Act was altered so as to read, "An Act to consolidate and amend the Law relating to the Constitution, Powers, and Functions of the Hydro-Electric Commission." An argument was based upon this alteration to the effect that it showed that it no longer intended that the Commission should be the means of exercising State control of all waters in rivers, streams &c. But the operation of an Act is determined by its provisions (where those are unambiguous)

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and not by its title. The provisions which were contained in the 1929 Act are re-enacted in the 1944 Act and where they have not been amended so as to produce any change in meaning they must be held to have the same effect in 1944 as in 1929. In my opinion the alteration of the title in the consolidating and amending Act does not in any way affect the meaning of s. 49, the provision which is important in this case.

Section 65 of the 1944 Act reproduced s. 49, except that sub-s. (1) was in the following terms:—"(1) Subject to rights lawfully held on the eighteenth day of January, 1930, the sole right to use waters in lakes, falls, rivers, or streams vested in the Commission by section forty-nine of the *Hydro-Electric Commission Act* 1929 shall be held by the Commission for the purposes of this Act."

In my opinion this amendment does not affect the plaintiffs' rights because they or their predecessors in title lawfully held rights as riparian owners on 18th January 1930.

Section 52 of the 1929 Act (s. 68 of the 1944 Act) provides that nothing in Part XIV. (relating to the powers of the Commission with respect to the waters of the State and including s. 49) shall affect the right of any person to the supply of water for stock or domestic purposes or under the *Mining Act* 1929. This provision preserves certain riparian rights but, as already stated, the use of water for stock or domestic purposes does not completely describe the rights of a riparian proprietor, and if s. 52 of the 1929 Act or s. 68 of the 1944 Act were treated as an exhaustive provision relating to the preservation of existing rights it would be impossible to give any effect to the preservation by s. 49 (1) (s. 65 in the 1944 Act) of rights lawfully held.

In my opinion, the plaintiffs have shown that they are entitled to a declaration substantially as sought, namely that they are entitled to the use of the waters flowing in a defined and natural channel in the North West Bay River as such waters have been accustomed to flow down to the plaintiffs' lands subject only to the lawful user of the said waters by riparian owners higher up upon the said stream. They are also entitled to a declaration that the proposed works of the defendant are contrary to the rights of each of the plaintiffs and to a consequential injunction.

It is now necessary to consider the counterclaim. The counterclaim was based upon the allegation (par. 1) that the waters of the North West Bay River are vested in the defendant by the *Local Government Act*. The counterclaim further alleged that the plaintiff H. Jones & Co. Pty. Ltd. was diverting water for the purposes of irrigation and that such diversion was an infringement

of the defendant's rights. The defendant claimed a declaration that the waters of the river were vested in the defendant and that the plaintiff H. Jones & Co. Pty. Ltd. was not entitled to divert and take from the river any water at all or, alternatively, no waters other than those required for the reasonable domestic needs of the plaintiff and its cattle. An injunction was also sought. By the judgment on the counterclaim the declarations sought were made except that the second declaration was in the following terms—" that the plaintiff H. Jones & Co. Pty. Ltd. is not entitled to divert and take from the said river any waters other than those required for stock and domestic purposes and reasonable extraordinary purposes."

In my opinion the defendant is not entitled to these declarations. In the first place, I have given reasons for the conclusion that the *Local Government Act* no longer operates to vest any waters in a council. Further, if this conclusion be wrong, it is still the case that the plaintiff company is entitled to the full exercise of its riparian rights. The defendant proposes to divert water at a point higher up the stream than the land of the plaintiff company. If the plaintiffs or any of them take too much water for irrigation or other purposes no person higher up the stream can complain and the council is not by any statute placed in the position of a lower riparian proprietor who might have a right to complain. The defendant therefore has no interest, as matters now stand, in the manner in which the plaintiff company exercises its riparian rights. If, however, any declaration were made with respect to the vesting of the river in the defendant, it should be declared that any such vesting by virtue of the *Local Government Act* was subject to the rights of the plaintiff as a riparian proprietor to the flow and the use of the water in the river.

The plaintiffs, however, in their defence to the counterclaim, relied, not only upon their property rights as owners of land upon the banks of the river, but also upon rights alleged to have been obtained by prescription. In my opinion the latter rights are not preserved by any of the legislation to which reference has been made. A prescriptive right to divert water from a stream and use it operates only as against a lower riparian owner, the owner of the servient tenement. Even if it were held to be preserved by any statute it would be preserved only as a right against that owner. The existence of a right in the plaintiff company as against a lower riparian owner does not, in respect of the water scheme proposed, have any relation to what the council now proposes to do. If the council had acquired land below the plaintiffs' land

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and was objecting to the diversion of water higher up by one of the plaintiffs, rights gained by prescription might come into controversy; but that is not the present case. Thus the defence to the counterclaim has no substance. The plaintiff company, however, is not doing or proposing to do anything which does or could wrongfully interfere with any lawful use which the council is proposing to make of its statutory powers, if any. In my opinion the defendant has no interest in the matter in respect of which it makes the counterclaim and the counterclaim should therefore be dismissed.

DIXON J. North West Bay River rises on the slopes of Mt. Wellington and follows a winding course in a south-easterly direction into North West Bay, a bay which opens upon D'Entrecasteaux Channel. It is not a big river, but as a creek or stream it is not inconsiderable. At its mouth on the southern side of the stream is situated a township called Margate. Further south on the shores of the bay at a distance of nearly three miles as the crow flies is another township, called Snug. High up the stream its waters are tapped by the City of Hobart as a source of supply for the city and port of Hobart. Under its statutory powers the corporation may take not more than half the waters of the stream at that point. Near the mouth of the stream are several parcels of agricultural land belonging respectively to the three plaintiffs.

The plaintiff Klingler owns and occupies an area of land on the south side of the river, which forms the northern boundary of the parcel; the eastern boundary is a straight line which at one or two points touches the irregular shore of the bay. There is no owner below him, although it may be that the land between his eastern boundary and high water mark on the beach of the bay might be considered theoretically to be riparian land. Doubtless it remains vested in the Crown. Next to Klingler's land on his west is a piece of land belonging to the plaintiff Worsley. It too is bounded on the north by the river. Then further west adjoining Klingler's land is land belonging to the plaintiffs H. Jones & Co. Pty. Ltd. But the company's land is on both sides of the river. On the northern side it extends a very long way upstream from a roadway which crosses a bridge at about the centre of Klingler's land. There is a strip of land between the roadway and the foreshore. The plaintiff company's land is a large area, but only for a comparatively short distance does it lie on both sides of the stream. The plaintiff company uses part of its land, about 55 acres, for growing hops. There is a hop garden on each side of the river and the company

uses the waters of the stream to irrigate the hops. The plaintiff Worsley uses the water for stock and for domestic purposes. The plaintiff Klingler grows seeds on his land, which he calls the Margate Seed Farm. He waters the seeds by means of sprays which are supplied with water from the river.

The Council of the Municipality proposes to establish a system of water supply for an area which includes the townships of Margate and Snug and for that purpose to draw off water from the river at a point a few miles upstream from the plaintiffs' land. The work has been commenced. It involves placing a weir in the stream and pumping off a supply of water into a receiving reservoir whence it gravitates. The plaintiffs have joined in complaining that if carried out the plan will result in such a reduction of the flow of the stream that their use of the water will be prejudiced. Relying upon their riparian rights they brought the action from which this appeal arises.

The defendant municipality justified the proposed interference with the stream as an exercise of power under Part XV. of the *Local Government Act* 1906 (Tas.) and alternatively under Div. XI. of Part II. of the *Towns Act* 1934 (Tas.), and further it counterclaimed for an injunction restraining the defendant company from using the waters of the stream for irrigation. The counterclaim was founded on an assertion by the municipality of a right under Part XV. of the *Local Government Act* to control all the waters of the stream down to its point of discharge into the bay. The plaintiffs made many answers both to the justifications set up by the defendant and to the counterclaim. The *Towns Act*, they said, would not support the plan, which went outside the ambit of that Act and which moreover was not and did not profess to be an exercise of the powers thereby conferred. To Part XV. of the *Local Government Act* the chief answers were (1) that under Part XIV. of the *Hydro-Electric Commission Act* 1944 (Tas.) the Commission is given the sole right to the use of waters in rivers and streams and that it is a later inconsistent enactment, and (2) that in any event Part XV. of the *Local Government Act* preserved existing riparian rights or a sufficient part of them for the plaintiffs' purpose. The plaintiffs also contended that the first of these answers has an application to Div. XI. of Part II. of the *Towns Act*.

The second of the answers they used both by way of reply to the defence justifying under Part XV. of the *Local Government Act* and by way of defence to the counterclaim setting up a right in the municipality to exclude riparian owners downstream from the

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use of the waters. To reinforce this defence to the counterclaim the plaintiff company asserted that not only did it possess the natural rights of a riparian proprietor but it had acquired by prescription a more extensive riparian right as against lower proprietors, namely a right to divert or draw off for irrigation purposes a considerable volume of water without returning any of it to the stream. *A fortiori* this incorporeal right, said the company, must be preserved by the *Local Government Act*. It is only in this way and as a defence to the counterclaim that a claim to a prescriptive right is raised and it does not enter into the case except as a subordinate issue arising, if at all, as an alternative answer to the defendant municipality's attempt to exclude the plaintiff company from the use of the waters of the stream independently of the execution of the municipality's plan for supplying water to the inhabitants and of any interference the plan involves with the flow of the waters higher up the stream.

The action was heard before *Morris* C.J. who dismissed the plaintiffs' claim and refused an injunction upon the counterclaim, making, however, some declarations of right on the counterclaim. His Honour declared that the waters of the river within the water district are vested in the defendant, the municipality, and that the plaintiff company is not entitled to divert and take from the river any waters other than waters required for stock and domestic purposes and reasonable extraordinary purposes. The learned judge considered that prescriptive rights were not preserved and therefore made no findings upon the subject of prescription.

The important question in the case is whether and to what extent the plaintiffs are entitled to protection, by injunction or otherwise, from the consequences of the defendant municipality's carrying out its plan and so interfering with the stream; and with that question I proceed to deal. It is a question which will be found chiefly to depend on the meaning and effect of a number of statutory provisions the interpretation and reconciliation of which are unusually difficult.

It is as well to begin with the interference with the stream which the defendant municipality's plan would cause. The works are designed to take off from the river a maximum of 253,000 gallons a day. If, however, the works were put into operation at once it is said that the quantity of water taken would be only half that figure. Measurements of water passing down the stream taken in February and March 1949 gave a daily flow varying between something over a million and a half and something over three million gallons. On these figures the amount which would be

taken off would be small in proportion to the whole but it would, no doubt, involve some sensible diminution of the volume of the stream. In drier seasons, however, when the water is low the proportionate effect would be much greater and in a very dry season it might conceivably be important in its effect upon the use of the stream by the plaintiffs, or at all events by the plaintiff company and the plaintiff Klingler.

Now there can be no doubt that unless such an interference with the stream had a statutory justification, or the plaintiffs had in some way derogated from their riparian rights, they could complain of what the defendant municipality proposes as an infringement of their proprietary rights as riparian owners and obtain relief by injunction.

It is enough to cite two statements of authority. First there is the statement by Lord *Macnaghten* in *Young & Co.* v. *Bankier Distillery Co.* (1), " The law relating to the rights of riparian proprietors is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court." Next there is a passage in the judgment of the Privy Council delivered by Lord *Kingsdown* in *Miner* v. *Gilmour* (2) :—" By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land ; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has

(1) (1893) A.C., at p. 698.

(2) (1858) 12 Moo. P.C. 131, at p. 156 [14 E.R. 861, at p. 870].

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no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." It is hardly necessary to say that what an upper riparian proprietor may not do is unlawful in a stranger to the stream, as the defendant municipality would be if its proposed works lacked statutory authority.

Further, a statutory authority does not warrant a greater impairment of riparian rights than a reasonable exercise of the authority conferred involves. "Riparian proprietors are entitled, except so far as their rights are varied by statute or by special circumstances . . . to require that nothing shall be done to affect to their prejudice either the quantity or quality of the stream as it flows in a natural state": per Lord *Loreburn* L.C., *Edinburgh Water Trustees* v. *Sommerville* (1).

Of the two statutory authorities upon which the defendant municipality relies, it is convenient to deal first with the *Towns Act* 1934, Part II., Div. XI. It ought, I think, to be put out of consideration for several reasons. The power conferred is to take and divert from a river, stream &c. flowing through or in the vicinity of the town a sufficient quantity of water for supplying the whole of the town for domestic purposes &c., s. 37. A variety of auxiliary powers is given. Compensation must be paid to parties interested in the water of a river or stream taken or used, ss. 38 (3) and 40.

In my opinion these powers cannot be resorted to for the purpose of justifying the proposed works of the defendant municipality and the interference with the stream they involve because in the first place the scheme is not based on the supply of a town. "Town" means any place proclaimed or declared to be a town under any law authorizing such a proclamation (*Acts Interpretation Act* 1931-1947, s. 46) and Margate and Snug apparently have been so proclaimed. But the basis of the scheme of water supply is distribution of water in a water district stretching along the shore of North West Bay and north and south beyond it. The district has a varying depth from the coast from about one to something less than three miles. It embraces much else besides the two towns. Assuming that the powers of s. 37 are exercisable for two towns in combination, the scheme adopted goes much beyond that. The financial and other considerations upon which the council proceeded and the Water Sewerage and Drainage Board acted in giving its approval under s. 8 of the *Water Sewerage and Drainage Board Act* 1944 and in recommending aid under s. 17 took into account the

(1) (1906) 95 L.T. 217, at p. 218.

supply of one enterprise or undertaking outside the towns and contemplated the spread of the distribution of water over the water district. Further, the point of off-take for the water is not in the vicinity of Snug and the river does not, at all events at that point, flow in the vicinity of Snug, so as to fulfil a necessary condition expressed in s. 37. In short I think the purpose is larger than the supply of the inhabitants of a town, a greater and differently conceived area is covered, the considerations governing the adoption of the scheme are outside Division XI., Part II. of the *Towns Act* and the source of supply is beyond the rather indefinite limit imposed by s. 37.

On 7th May 1947 the Governor-in-Council proclaimed the tract of land already mentioned to be a water district within the municipality of Kingborough within the meaning and for the purposes of Part XV. of the *Local Government Act* 1906. In my opinion the defendant municipality must for its justification rest upon this statutory authority. There is no other that will suffice. I shall therefore deal with it at once. The *Local Government Act* 1906 is entitled an Act to consolidate and amend the law relating to Local Government. Part XV., which is headed " Water District," does not correspond with any previous statute. It appears to have been drafted for the purposes of the Act of 1906. A number of special Acts existed creating water districts in different parts of Tasmania and the policy in part embodied in Part XV. seems to have been to place these districts under the authority of the municipal councils to be set up under the Act of 1906 and make a general provision under which new water districts might be established without the necessity of seeking special parliamentary authority. But the transfer to the council of control of then existing water districts is dealt with in part elsewhere in the *Local Government Act* 1906. By s. 22 (4) it is provided that as from a date proclaimed by the Governor-in-Council the control and government of any existing water district within a municipality established under the Act of 1906 should pass to the council, which should have the powers and be subject to the liabilities of the trustees or other former governing body and should be vested with the assets and rights of such body. Part XV. opens with two general provisions prescribing the course to be followed in setting up new water districts—ss. 206 and 207. A petition is to be presented to the Governor-in-Council by a council of a municipality or the councils of two or more municipalities praying that a tract of land within its or their boundaries should be constituted a water

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district. After due notice by public advertisement the Governor-in-Council may grant the petition in such modified extended or amended form as he may think fit.

Section 208, which follows, deals with the manner in which water districts are to be governed when two or more councils are the petitioners and deals also with their powers. Section 209 then proceeds to provide for the control and regulation of water districts by councils. A basal question in the case is in my opinion the meaning of s. 209. As that is so and as the chief importance of s. 208 is the light it throws on the meaning of s. 209 it is perhaps better before examining these two sections to state shortly the effect of the remaining provisions of Part XV. Section 210 makes applicable to the purposes it defines the borrowing powers conferred elsewhere in the Act upon councils. They are defined as the purposes of constructing and maintaining works and appliances for the storage and distribution of water within the area of any water district within the municipality. Sections 211 and 212 confer power to levy and enforce a water rate. Section 213 gives the council three heads of power. One is to enter upon land within the water district for the purpose of constructing locks, dams, wells, water channels and tanks and for works in connection therewith. Another relates to locks, dams and embankments already constructed for retaining water and authorizes the council, subject to compensation, to take possession of them, alter them and remove them. The third concerns the level or flow of the water in locks, dams, wells or works; it empowers the council to alter, vary or regulate in manner prescribed such level or flow. Section 214 deals with the supply by the council of water to be used within the water district. It says the council shall supply such water but reduces the obligatory force of the word "shall" by adding "for such purposes, to such persons, upon such contracts, at such prices . . . and generally upon such conditions as the council may think proper." The section goes on to confer some more specific authorities in aid of this power and it enables the council to contract to supply water outside the water district. Section 215 then provides that no council shall supply water for irrigation or for any other purpose until all persons entitled to a supply from such council for domestic or stock supply purposes have been first supplied by such council. The word "entitled" probably refers not to any absolute right but to that kind of obligation which the word "shall" in s. 214 contemplates as resting on the council and to the confident expectation which is felt by a ratepayer connected with a water system

that his supply will continue. But the provision is, I think, directed to supply by the council through its system; not to the flow of water down natural creeks and streams in quantities sufficient for the domestic use of riparian owners and for watering their livestock. The remaining provisions of Part XV., ss. 216 to 220, govern the distribution by the council of water in various circumstances and the application by the council of moneys received in respect of water. It is apparent that they proceed upon the assumption that a water district will place a large though possibly a sometimes inadequate supply of water at the command and under the regulation of a council.

The provisions that I have described form the context in which s. 209 is found. This section begins with the statement that the council of each municipality should have the care, control and management of every water district within the municipality which theretofore had been controlled and managed by the council of a rural municipality or other abolished local body. So far the section is upon ground covered by s. 22 (4). It goes on to vest in the council watercourses within the water district and confer upon the council the power of control and regulation of the supply of water along and by the watercourses. But the word " such " occurs in this part of the section before the words " water district " and later before the words " river, creek or watercourse." Grammatically the first " such " appears to go back to the entire description of the water district, namely " water district within the municipality which heretofore has been controlled and managed by the council of a rural municipality or other abolished local body." In the same way the second " such " appears to go back grammatically to the entire description of the watercourses of which it is enough to quote the following part, namely " every river, creek or watercourse within the limits of every such water district." If this strict grammatical construction represents the meaning of the provision then it confers powers and vests streams only with respect to water districts created before the commencement of the *Local Government Act* 1906, viz. 31st August 1907.

The question whether s. 209 has this limited operation is, I think, really the initial question in the case. But it is one upon which the parties are not at a definite issue. Counsel for the respondent municipality contended that the section applied alike to newly created water districts and to those existing at the commencement of the Act. Counsel for the appellant company was not inclined to contest this position, feeling perhaps the weight of the considerations against the strict grammatical construction

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and conscious, no doubt, that because of the express saving of certain rights of riparian owners the plaintiffs appellants might be better off under the section than they might be if powers necessary to provide water from streams were implied by the court from the quasi-obligation to supply water imposed by Part XV. on the council.

But nevertheless we must decide whether s. 209 does or does not apply to water districts created under ss. 206 and 207 after the commencement of the *Local Government Act* 1906. There are indeed strong reasons in the context and subject matter for supposing that the word " such " was not used with an intention of limiting the operation of s. 209 to water districts theretofore established. In the first place if it were so limited in its operation, there would be no express power conferred by the statute by which in the case of a newly created water district the council could carry into effect any scheme for collecting water or could obtain water for the purpose of supplying it. It can hardly be doubted that the provisions forming the context of s. 209 are framed on the assumption that, as the governing body of any water district, a council is armed with all the powers of a water supply authority. The procedure laid down by ss. 206 and 207 for erecting new districts makes it equally clear that this assumption applied alike to new and to old water districts. Section 208 supplies a further consideration which appears to me to make it certain that s. 209 was intended to cover water districts established pursuant to ss. 206 and 207, as well as water districts existing at the commencement of the *Local Government Act* 1906. Section 208 can be divided into two parts both of which deal with water districts proclaimed under the Act. The first part provides that such a water district proclaimed upon the joint petition of the councils of two or more municipalities shall be managed and regulated by a joint council. The second part then proceeds :—" and such joint council shall have and exercise in respect of such water district all the powers, rights and privileges hereinafter vested in or conferred upon single councils in respect of water districts under the control and management of such single councils respectively." Now s. 209 is the provision conferring the powers rights and privileges which are essential to the operations of a council and it deals with a single council. Whether it is limited or is not limited to single councils in whose municipality a water district already existed, the powers, rights and privileges it gives are of course taken by s. 208 and bestowed on joint councils. But joint councils govern only new water districts. You have therefore all the powers &c. described by s. 209

conferred on the governing body of a new water district if it is a joint council and you have this done by a referential provisione referring to single councils. Is it conceivable in these circumstances that a single council of a new district was not meant to enjoy the same powers &c. ? As already appears, the reasons for placing upon s. 209 a construction incapacitating the section from carrying out this intention are to be found in the grammatical consequences of the word " such." It may be conceded that when s. 209 vests in a council " every river, creek or watercourse within the limits of every such district " the " such " refers back to the antecedent expressed in the words " every water district within the municipality which heretofore has been controlled and managed by the council of a rural municipality or other abolished local body " and that prima facie it brings down the sense of the whole of this description. In the same way it may be conceded that when the section later speaks of " such river, creek or watercourse " and gives the council the control and regulation of " the supply of water along and by every such river, creek or watercourse within such limits " the word " such " where first occurring in this phrase prima facie refers back to the rivers, creeks and watercourses so vested and, where secondly occurring, to the limits of the water districts so described. But to concede that the prima facie logical or grammatical effect may be to bring down by successive steps the limitation contained in the words " heretofore controlled and managed " is one thing. It is quite another thing to treat the prima facie meaning as prevailing over the indication of a contrary intention supplied by the context and by the substantial nature of the provisions.

The word " such " is frequently misused. Often it is employed without much consideration of what actual purpose it serves. In *Eastern Counties Railway Co.* v. *Marriage* (1), a question of a not dissimilar character arose upon the *Lands Clauses Act* 1845 concerning the effect of the word " such " in the opening words of a section which began : " If any *such* land shall be so cut through and divided." In the preceding section the word " land " occurred more than once, but the only available antecedent which would make sense occurred at the beginning of that section, viz., " If any lands not being situate in a town or built upon." But although it made sense to limit the ensuing section also to lands not situate in a town or built upon, it was not a probable intention and the House of Lords, though contrary to the advice of a majority of the judges, rejected the strict consequence of the meaning of the

(1) (1860) 9 H.L.C. 31 [11 E.R. 639].

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word " such " and decided against the limitation. Lord *Chelmsford* said (1):—" I think that too much stress has been laid in the argument upon the word ' such,' which it was shown has been employed in various parts of the Act without much regard to propriety or to its supposed relative force. Many of the learned Judges deal with it as if it were a settled rule of construction that it should be referred to the last antecedent. I am not aware that this is a word of such close relation that it must necessarily refer to the next immediate antecedent . . . At the same time it must be admitted that every relative ought to be referred, not perhaps to the next antecedent ' which will make sense with the context,' but to that to which the context appears properly to attract it." In *R.* v. *Randall* (2), it was decided that in a Highway Act the expression " all such woods, mines, and quarries of stone or other hereditaments as have heretofore been usually rated to the highways " included mines and quarries opened since the passing of the Act, if of a similar nature. *Wightman* J. said (3) that the case depended on the word " such." " Now the words ' such ' as have been usually rated certainly may refer to the genus; and unless this construction be put upon the Act new mines will be exempt from a liability to which old mines of a precisely similar character are subject, which could hardly be the intention of the Legislature . . . I think ' such as ' here means ' of such description as '."

In *R.* v. *Burrell* (4), a question arose as to what would amount to a compliance with a provision of the *Municipal Corporation Act* 1835 requiring an alphabetical list of burgesses in the form appointed by the Act and penalizing overseers who should " neglect or refuse to make out, sign and deliver *such* list." What was decided was expressed thus by *Patteson* J. (5):—" ' Such list ' does not necessarily mean a correct and perfect list, but a list of such a kind and description as the Act requires. The omission of some names, or the want of exact alphabetical collocation of others, would not prevent it from being such a list." In *R.* v. *Vasey* (6), where a somewhat indefinite effect was given to the word " such," Lord *Alverstone* C.J. remarked (7): " This case is a good instance of the principle that the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language."

(1) (1860) 9 H.L.C., at pp. 73, 74 [11 E.R., at p. 655].
(2) (1855) 4 E. & B. 564 [119 E.R. 207].
(3) (1855) 4 E. & B., at pp. 568-570 [119 E.R., at p. 209].
(4) (1840) 12 A. & E. 460 [113 E.R. 886].
(5) (1840) 12 A. & E., at p. 468 [113 E.R., at p. 889].
(6) (1905) 2 K.B. 748.
(7) (1905) 2 K.B., at p. 751.

These decisions are, of course, no more than illustrations of the recognition by the courts that difficulties caused by the ill-considered resort of draftsmen to the use of the word " such " are to be met by a readiness on the part of the courts to mould the application of that not inflexible relative word so as not to defeat the intention gathered from the context. But the observations quoted suggest what is, I believe, the solution of the difficulty in the present case. It lies in recognizing that a draftsman in using the word " such " may not have in mind all the precise qualities which by an adjectival phrase he may have attributed to his antecedent in an earlier part of his text and may really intend to refer only to the general nature of the thing or concept to which he has occasion again to refer. In yielding to the temptation to employ the word " such " and avoid all repetition he may not have seen or been alive to all the implications which a logical application of the word involves. To borrow the phraseology of Lord *Chelmsford* and give it a somewhat different application, there may for this reason be occasions when the relative " such " ought to be referred not to all the characteristics contained in the previous description of the antecedent but to the more general characteristics to which the context appears properly to attract it. Here I think the truth is that the draftsman desired to confine the provision made in s. 209 to water districts within municipalities and to rivers, creeks and watercourses within the limits of water districts within municipalities. He sought to re-express the limitation by employing the word " such " but he did not intend by so doing to re-express the further limitation of water districts to those which theretofore had been controlled and managed by the council of a rural municipality or other abolished local body. That it could not have been so intended is, I think, shown by the considerations I have already stated, and effect is best given to the real intention by modifying the strictly logical application of the word " such " and doing so in accordance with what it may reasonably be supposed was felt to be the sense of the word when it was employed.

For the foregoing reasons I am of opinion that s. 209 applies to water districts proclaimed after the commencement of the *Local Government Act* 1906.

The *Towns Act* 1934 being out of the case, it follows that subject to the effect of Part XIV. of the *Hydro-Electric Commission Act* 1944, the powers and rights of the respondent council and correspondingly the rights of the appellant company to relief in this

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proceeding are governed by the provisions of Part XV. of the *Local Government Act* and particularly by those of s. 209.

But there is more than one difficulty in ascertaining the effect of s. 209, even considered independently of the *Hydro-Electric Commission Act* 1944 and the relation of the latter Act to s. 209 presents no easy problem.

To begin with s. 209 vests in the council every river, creek or watercourse within the limits of a water district. What is the effect of this vesting ?

Statutes which vest in a public authority highways, sewers and other artificial works, such as sea walls and embankments, serving a definite public purpose, open to public use or access as of common right, have received a construction according to which the authority takes less than the full property in the site, less than property unlimited in point of altitude or depth. The operation of the statutory vesting is considered as confined to the purpose to be fulfilled. The subsoil beneath a street so vested becomes the property of the authority only to so far down as is reasonably incidental to the construction and maintenance of the highway and to its proper control. There is a corresponding limitation upwards on the rights which would arise from ordinary ownership of land. There is much authority illustrating this construction of provisions vesting highways, sewers and the like, but it is perhaps sufficient to refer to *Port of London Authority* v. *Canvey Island Commissioners* (1). The same kind of construction appears appropriate when, as in s. 209, rivers, creeks and watercourses are vested in a water supply authority. The description of the subject vested is indefinite. It is not a piece of land with defined boundaries. The purpose is limited. If any interest in the soil is taken by the council it is no greater than is necessary to enable it to control and use the waters of the streams so that the council may supply water and to that end construct weirs and other works. No doubt the council obtains a proprietary interest in the running waters of the stream but it is an interest in them considered as the running water of a stream and again it is an interest incidental to the exercise by the council of the particular function and does not extend further. In *The Medway Co.* v. *Romney* (2), a body of persons had obtained by a statute of 1739 powers of making the river Medway and streams flowing into it navigable. By the statute the rivers and streams so to be made navigable and all lands tenements and hereditaments to be by the body made use

(1) (1932) 1 Ch. 446 at pp. 475-476, 483-485, 499-502.

(2) (1861) 9 C.B. (N.S.) 575 [142 E.R. 226].

of for the benefit of the said navigation were vested in them. The justices of the peace for the County of Kent and the committee of visitors for the County Gaol and Lunatic Asylum obtained a piece of riparian land and from it laid a pipe to the asylum and the gaol some distance away and through the pipe they pumped water and thus supplied those institutions. The question was whether this infringed upon the statutory rights conferred upon the body whose successor in title the plaintiffs were. The Court of Common Pleas decided that it did. Looking at the objects contemplated by the statutes the court construed them as creating a new species of property and interest in the water, which interest was interfered with by the abstraction of the water for the defendant's purposes, purposes more extensive than those of a riparian proprietor. *Willes* J., delivering the judgment of the Court said (1), "In our view of the true construction of the acts of Parliament, it is not necessary that there should be an actual damage to the navigation, because we think that the legislature intended to give the company such an interest in all the water of the river for the purposes of the navigation as is interfered with by the abstraction of any part thereof." It will be seen that the governing principle was considered to be the purpose of the statutory vesting, though the application of the principle led to a conclusion that strangers were excluded from any use of the water except perhaps in the exercise of riparian rights. Upon the present appeal the respondent council claimed to be in the same position, so that it was entitled to complain of the use made by the appellant company of the waters of the stream far below the site of the intended works of the council, to complain of the use on the ground that it exceeded the use to which a riparian owner is entitled. If s. 209 were unaffected by any later or other Act I should think that perhaps it would give the council, as it contends, a *locus standi* to complain of any use of the water of a stream at any point within the limits of the water district if it involved an abstraction of the water which could not be justified either as an exercise of riparian rights or under some other right or title. I say this because the purpose of the vesting appears to be to enable the council not only to use the waters but to maintain the streams within the water district free from interference so that there will be no danger of their sufficiency and purity being affected. Further, the "vesting" takes into account no question of degree and none of place or position except situation within the water district. But of course the operation of other statutes must be considered and the extent of riparian

(1) (1861) 9 C.B. (N.S.), at pp. 591-592 [142 E.R., at pp. 232-233].

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rights. There is no express saving of riparian rights from the effect of the vesting of the streams, although in the ensuing part of the section the power of the council to regulate the flow of the stream is made subject to the existing rights of any riparian proprietors. But riparian rights are incidents of property: there is no indication of any intention to destroy them and the bare vesting of the stream is not an apt or sufficient way of doing so. Unsatisfactory as the drafting may be, the express saving in s. 209 of previously existing riparian rights from the operation of the power of controlling the flow makes it certain that they are preserved from impairment by the vesting part of the section. Otherwise the express saving would be futile.

I shall now pass to the question or questions arising upon the latter part of s. 209. It is as follows:—"and subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river, creek, or watercourse, the council shall have the absolute control and regulation, so far as the same can be effected by artificial means, of the supply of water along and by every such river, creek, or watercourse within such limits."

It will be noticed that what is to be controlled and regulated is the supply down the stream. The parenthesis "so far as the same can be effected by artificial means" shows that the control of a swollen or flooded river was as much in mind as that of a river running low. The words evidently contemplate the possible insufficiency of mechanical means to control a stream. Under the power the council might control and regulate the flow of a stream by means of the locks, dams, water channels and tanks which the council had constructed in pursuance of s. 213 in order to take off and store water and to distribute it within the municipality. But the power is expressed to be subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river, creek or watercourse. The meaning and application of this reservation of rights is in controversy and it is a question on which much turns.

The appellant company claims that it operates to preserve the entire bundle of rights of a riparian owner with reference to the stream as well as rights obtained by grant or prescription. The respondent council on the other hand maintains that no more is preserved than the primary right to abstract water for domestic use and the watering of stock and the like uses. In *Cook* v. *Vancouver Corporation* (1), Lord *Moulton*, speaking for the Privy Council, said:—"Riparian rights under English law are of two kinds.

(1) (1914) A.C. 1077, at p. 1082.

First, there is the right to make use in certain specified ways of the water flowing by the land, and secondly there is the right to continuance of that flow undiminished." The same distinction, in my opinion, is made by s. 209. The section does not mean to preserve more than the right to use the water flowing by the land. It is of course possible to regard the rights at common law of a riparian owner as a *fasciculus* that is not to be dismembered so that the right to use the waters cannot be divorced from the right to the undiminished flow of a stream. But that is not a conception of the rights to which the statute can give way. The language of s. 209, speaking as it does of rights to the use of the waters flowing, appears to me, clearly enough, to distinguish, as Lord *Moulton* does, between the right to the natural flow of the stream not sensibly changed or reduced and the right to the use of the waters. The latter right only is preserved. To be preserved it must have been a right "previously existing." This has been taken to mean previous to the setting up of the water district. Apart from rights against other riparian owners acquired by grant or prescription, it is enough that the land should have been alienated from the Crown and given a boundary consisting of or contiguous with a natural river watercourse or stream; riparian rights follow as an incident of ownership. In effect, then, the "rights previously existing" are those annexed to land alienated by the Crown before the proclamation of the water district, that is unless, contrary to what has been assumed, some earlier date or event is intended, such as the commencement of the *Local Government Act* 1906.

The right to use the waters of a stream, when considered independently of any right to have waters available for use, must be a right only against lower riparian proprietors. The extent of the lawful use which may be made of the waters of a stream is measured as against them. But it is obvious that s. 209, when it preserves existing rights to the use of the water from impairment by the council's control and regulation of the supply of water along and by a watercourse &c., means that the right shall not be prejudiced by what is done upstream. The common law, however, does not quantify the right to the use of water by reference to parties upstream. They are required simply to allow the stream to descend without sensible diminution. It is then available to those lower down. But what each of them may do with regard to it is measured by reference to the rights of riparian proprietors whose lands are lower down than his. The odd result is that the quantification or extent of the right preserved by s. 209 from prejudice by a council's works must depend upon the manner in which the

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law measures as against a lower proprietor the riparian right of an upper proprietor to abstract water, for plainly the statute treats them as rights defined and measured and there is no other standard measuring or defining them. But at this point a new or further difficulty arises. It is that the law does not provide one standard or measure of the right but divides the right into two and affixes to the respective divisions different standards by which the right to water may be measured. In a case from India Lord *Dunedin* stated the distinction. " The right of a riparian owner to take water, is first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one. But there is a difference of degree between these primary and secondary rights " : *Secretary of State for India* v. *Subbarayudu* (1). His Lordship then went on to explain the distinction of degree by citing passages from the judgments of Lord *Cairns* in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co* (2), and of Lord *Macnaghten* in *McCartney* v. *Londonderry & Lough Swilly Railway* (3). The effect of these passages has been briefly stated as follows :—" . . . it is sufficient to state that a riparian owner may take and use the water for ordinary purposes connected with the riparian tenement (such as domestic purposes or the wants of his cattle), and that in the exercise of his right, he may exhaust the water altogether ; that he may also take and use the water for extraordinary purposes, if such user be reasonable and be connected with the riparian tenement, provided that he restores the water so taken and used substantially undiminished in volume and unaltered in character " : per *Lawrence* J., *Attwood* v. *Llay Main Collieries* (4). The former is the primary right, the latter the secondary right. Irrigation is permitted as an exercise of the secondary right, but it may not be done to a degree that would cause a serious reduction in the volume of water flowing down by lower riparian tenements. " When only a part of the stream is taken, and that for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished " : per Lord *Dunedin* (5).

For the defendant municipality I understand it to be suggested that, in effect, it is the primary right only which is preserved by the words " subject to previously existing rights of any riparian proprietors to the use of water." It is true that it alone is an

(1) (1931) L.R. 59 I.A. 56, at p. 64.
(2) (1875) L.R. 7 H.L., at p. 704.
(3) (1904) A.C., at p. 307.
(4) (1926) Ch., at p. 458.
(5) (1931) L.R. 59 I.A., at p. 64.

absolute right: the secondary right being relative or correlative to the right of the lower proprietor. But I think that there is no warrant either in the text or the context of s. 209 for limiting the expression "rights of riparian proprietors" in this way. I think therefore the so-called secondary right must be taken to be within the reservation. This conclusion, however, involves a greater difficulty than might appear from the foregoing descriptions of the secondary right. The reason is that in the descriptions above of the permitted use of water by a riparian proprietor, it has been taken for granted that there is a lower tenement and that the proprietor stands upon his rights. In this case, however, we have the proprietors of the last three tenements upon the river in its course to the sea making common cause. They say that the residue of the stream descends to them and there are no ulterior interests to be considered. According to *Channel* B. "the rights of a riparian proprietor with respect to the stream are limited only by those of persons in a similar or analogous position with respect to the stream as himself": *Nuttall* v. *Bracewell* (1). What rights are there to the use of the waters of the river which would limit those of the plaintiff Klingler? Possibly some limitation might be spelt out from the existence of land with a river frontage on the north side of the river opposite Klingler's tenement and between the road and the foreshore, land which does not appear to belong to any of the plaintiffs; possibly from the existence of some land between Klingler's land and the foreshore. We know that towards the mouth of the river the water was not found fresh enough for irrigation but how far up this was so does not appear. But apart from these theoretical possibilities there seems no reason for limiting Klingler's right, his secondary right, to take water from the stream for irrigation by the obligation of causing no serious diminution of the volume of the stream. It would be unsafe to give effect to the theoretical possibilities mentioned. As the plaintiffs have combined in seeking relief, it is unnecessary to pursue the question whether for the purposes of the reservation in s. 209 the measure of the right of the other two plaintiffs to take water is that of their right against a lower proprietor or proprietors, that is to say the right of the plaintiff Worsley against the plaintiff Klingler and of the plaintiff company against those two plaintiffs.

So far I have considered the case independently of the operation of the *Hydro-Electric Commission Act* 1944 and before passing to the difficult question what effect that statute produces upon the powers of the council and the situation of the parties it is desirable

(1) (1866) L.R. 2 Ex. 1, at p. 13.

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to re-state summarily certain of the conclusions which the foregoing appears to warrant. Briefly they are, first, that the water district has been lawfully established and the council armed with sufficient powers to carry out its plan under Part XV. of the *Local Government Act* subject always, however, to the existing riparian rights of the plaintiffs to the use of the water: secondly, that the riparian rights thus preserved as paramount do not include a right to an undiminished flow of the stream but do include a right to take water from the stream for irrigation and other purposes in quantities which, so far, at all events, as the plaintiff Klingler is concerned, do not appear to be limited by an obligation to cause no substantial reduction in the volume of the stream. How far the plan of the council when carried out is shown to be necessarily inconsistent with the enjoyment of such a right is perhaps a question in which, if the matter stopped here, the plaintiffs' title to relief might depend. But at this point it is necessary to suspend that question and to turn to the *Hydro-Electric Commission Act* 1944. That is an Act to consolidate and amend the law relating to the constitution, powers and functions of the Hydro-Electric Commission. The Commission was established by the *Hydro-Electric Commission Act* 1929, which was entitled an Act to provide for the establishment of a Commission to manage and control the State Hydro-Electric Works; and to provide for State control of all waters in lakes, falls, rivers and streams and to vest such control in the said Commission; to empower the said Commission to regulate the use of such waters in certain cases. Section 49 (1) of this earlier Act provided that subject to any rights lawfully held at the commencement of the Act, the sole right to use water in lakes, falls, rivers, or streams shall vest in the Commission, and such sole right shall be held by the Commission for the purposes of the Act. The Act commenced on 18th January 1930. In the consolidating Act of 1944 this sub-section is represented by sub-s. (1) of s. 65. Section 65 (1) is as follows: "Subject to rights lawfully held on the eighteenth day of January, 1930, the sole right to use the waters in lakes, falls, rivers, or streams vested in the Commission by section forty-nine of the *Hydro-Electric Commission Act* 1929 shall be held by the Commission for the purposes of this Act." The plaintiffs' contention is that this provision is inconsistent with Part XV. of the *Local Government Act* 1906 or at all events with s. 209 and, whether it operates as an implied partial repeal or places the inland waters of the State outside the operation of s. 209 upon water districts proclaimed after 18th January 1930, the effect of the provision is to exclude the defendant

municipality from all power and control over or use of the waters of the North West Bay River. Section 65 (5) provides that the section should not apply to or in respect of any rights directly granted by any Act, and reliance was placed upon this as preserving the operation of Part XV. of the *Local Government Act*. But I cannot see how Part XV. directly grants any right to the Municipality of Kingborough or its council. Part XV. gives powers to the Governor-in-Council. It is impossible to say that the competence of the council to petition for their exercise was a right, and, if the proclamation by the Governor-in-Council of the water district resulted in the creation of any rights in the municipality or its council, it is impossible to say that they were directly granted by an Act. Section 65 (5) is really pointed at powers given by sub-ss. (3) and (4) to purchase and compulsorily acquire water rights existing on 18th January 1930. Equally impossible is it to say that the municipality or council lawfully held any rights under Part XV. before 18th January 1930 within the opening words of sub-s. (1). Great doubt may be felt whether the legislature perceived the effect of vesting in the Commission the sole right to use waters in lakes, falls, rivers or streams. But the word " sole " excludes from the use of the waters all persons and bodies who cannot vouch the protection of the exceptive provisions of Part XIV. of the *Hydro-Electric Commission Act* 1944 or of some special Act. Considered by itself it is inconsistent with the full operation of Part XV. of the *Local Government Act* and of much other legislation, in particular with s. 37 of the *Towns Act*. The devastation it may cause among statutes, however, is no reason for denying its plain meaning. The long title to the Act of 1929 makes it impossible to confine the operation of s. 65 (1) by reference to the purposes of the Commission in relation to hydro-electric energy. In so far as the inconsistency extends, the provisions of Part XIV. of the *Hydro-Electric Commission Act* must operate as an implied repeal (*pro tanto*) of Part XV. of the *Local Government Act*. But the principle of interpretation is that " a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together . . . Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied " : *Kutner* v. *Phillips* (1).

The great inconvenience which results from holding that Part XIV. of the *Hydro-Electric Commission Act* 1944 operates as a

(1) (1891) 2 Q.B. 267, per *A. L. Smith* J., at pp. 271, 272.

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repeal of prior statutory provisions like Part XV. of the *Local Government Act* giving powers to use the water in lakes and streams for water supply and other purposes is a powerful consideration strengthening the application of the principle of construction in this instance. Among the provisions of Part XIV. is one giving a power to the Governor-in-Council to direct the grant of a permit for the use of water and it appears to me that if this provision is open to a construction, as I think it is, which would place in the hands of the Executive authority to except water supply authorities from the exclusion worked by s. 65 (1) from the use of water in lakes and streams, it ought so to be construed. So to interpret it will give effect to the principle of construction and avoid the great inconveniences which must result from holding that Part XIV. rigidly and inexorably limits the use of water to the Commission except for the saving of rights existing before 18th January 1930 or directly granted by an Act and the exception which is made by s. 68 of the supply of water for stock or domestic purposes, or under the *Mining Act*. The provision conferring the power in question on the Governor-in-Council is s. 67, which is as follows :—" To the extent to which the right to the use of water in any lakes, falls, rivers, or streams is vested in the Commission, the Commission shall, if the Governor so directs, and subject to such conditions as the Governor may determine, permit any person to be designated by the Governor to use such water for any purpose other than the generation of electrical energy." If this section is interpreted as meaning to give a full discretion to the Executive to require that consent shall be given by the Commission to any public or private use of water (except for the production of electrical energy) then, it seems to me, that the legislation of Tasmania on the subject of water supply and the use of water assumes a rational form and has an intelligible operation. For myself, I do not see any great difficulty in giving the provision a construction that would enable the Executive to direct the Commission to permit the municipality or the council to use the water of the North West Bay River for the purposes of the proposed water supply scheme under Part XV. of the *Local Government Act*. The permit would confer no right : it would relax a prohibition, the prohibition involved in the Commission's statutory right to the sole use of the water. By the express terms of s. 67 the permit is " to the extent to which the right to the use of water . . . is vested in the Commission," so that it operates just as a licence co-extensive with the exclusive right, simply making

lawful what would otherwise be unlawful. It does not affect the rights of others.

The "rights lawfully held" on 18th January 1930 which are saved by s. 65 (1) from the annihilation which that provision otherwise would have worked, do not come into the question. Section 65 (1) left them where they were and so would a permit under s. 67. The permit would simply allow the municipality or council to come in and use the water and so to come in with all its powers and subject to the limitations and reservations belonging to those powers.

The difficulty of applying the expression "any person designated by the Governor" does not strike me as very real. In terms s. 209 of the *Local Government Act* "names" the Council as the body in whom control and power are vested. That is true of the other provisions of Part XV. Even if the council is to be considered an independent body acting in its own right, nevertheless it is a "person," according to the definition of the *Acts Interpretation Act* 1931 (Tas.), s. 41, because it is an incorporated body. The words "to be designated by the Governor" do not seem to imply a living person or a corporate body or to be inapplicable to a council. It means no more than to be specified, indicated or appointed, by the Governor. Indeed it may be suspected that the reason for using the word "designated" instead of "named" was lest "named" should be considered too narrow and incapable of including, for example, bodies known by a description. But when Part XV. gives control of a water district to the council and invests it with powers, the council is intended to exercise its authority on behalf of the municipality. It is upon that footing that the municipality and not the council is made the defendant in the present action. Section 27 says that every municipality subject to the provisions of the Act shall be governed by a council and all acts of the council shall be deemed to be the acts of the municipality. Thus the money borrowed for the work is borrowed on the credit of the municipality, ss. 190 and 210. I imagine that a permit might properly be granted to the principal, the municipality, for it needs the protection of the permit as much as the representative, the council.

However these are small points. The chief consideration is that the provision is readily susceptible of a construction which leaves room for the operation of Part XV. of the *Local Government Act*, although that operation is now qualified by a condition that the Governor-in-Council should give the necessary direction to the Commission. I am disposed to go further and say that the

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prima facie meaning of the words of s. 67 (which are very general) covers a council as the authority of a water district. But it is enough to say that being capable of such a construction, that construction ought to be adopted.

It follows in my opinion that Part XV. of the *Local Government Act* is not repealed but that before a council acting under it can lawfully use water a direction under s. 67 of the *Hydro-Electric Commission Act* 1944 must be given by the Governor-in-Council.

On 28th September 1945 the Commission purported to grant the council permission to draw one and a quarter million gallons of water a day from the North West Bay River. But it does not appear that any direction to grant the permit was given by the Governor-in-Council. I think that s. 67 places the discretion in the Governor-in-Council. We should therefore disregard this permit. It does not follow that an injunction should be granted because the council has not yet obtained a direction under s. 67. It is the " use " of water without a permit that is contrary to the *Hydro-Electric Commission Act* and the work has not yet advanced far enough to enable the municipality to use the water. Whether the absence of a permit would give the plaintiffs a ground of complaint is, moreover, a question. In this view of the effect of Part XIV. of the *Hydro-Electric Commission Act* the plaintiffs' case comes back to the question whether the scheme of the defendant municipality necessarily means that the municipality threatens and intends to deprive the plaintiffs or any of them of the use of the quantity of water for irrigation to which their riparian rights entitle them respectively in the manner I have sought to describe. I have left open the question whether the three plaintiffs by combination can place the plaintiff company and the plaintiff Worsley in a position to claim a greater right to water than if their secondary right was measured on the footing that there were lower riparian proprietors. Let it be supposed that they are in such a position. The combined demands of the plaintiffs are high. *Morris* C.J. thought that the plaintiffs might at times take 900,000 gallons a day. At the hearing of the appeal it was said that the maximum quantity might be 1,044,000 gallons a day. The off-take of the council, however, could not exceed 253,000 gallons a day. It is unlikely that in ordinary seasons there would be any difficulty in satisfying both demands. In an exceptionally dry season, however, a difficulty might arise. The difficulty could of course be met, unless there was a phenomenal shortage of water, by co-operation between the parties. For irrigation to the full capacity of pumps is not a thing repeated day after day. But that is a

matter for them in the future. What the court must do is to grant an injunction if there is a real present threat to deprive the plaintiffs of water that they should receive, and refuse it if there is not. It appears to me, even on the assumption I am making, that it all depends on the future action of the engineer who may happen in fact to be controlling the amount of water passing downstream if and when contingent events occur. In the extraordinary confusion attending this difficult legislation, it is hardly to be expected that the defendants should have had any clear picture of their obligations to the plaintiffs. But I do not think that it can be inferred from the daily capacity of the works proposed that the plaintiffs would necessarily be deprived of water they required and were entitled to demand at the time when they needed it if, owing to a dry season there was not enough for both parties in competition. I do not think that the plaintiffs have made out a case for relief.

On the other hand I think that the defendant's counterclaim ought not to have succeeded even to the extent to which it did. Upon the construction I have given to s. 209 of the *Local Government Act* the riparian rights previously existing are saved from the effects of the vesting of the streams in the council as well as from the operation of the council's control and regulation of the supply along and by the streams. The counterclaim is based wholly upon the council's right in the stream as and after it flows past the riparian land of the plaintiff company. The council has no claim to use the stream at that point and no permit to do so would be directed by the Governor-in-Council. In these circumstances the vesting is meaningless in relation to the plaintiffs. If the plaintiff company's riparian rights to the use of the water are saved from the consequences of the vesting, as I think they are, then I think the counterclaim should fail. The defendant's reliance on prescriptive rights which the company set up was on this view unnecessary. I would dismiss the appeal so far as it relates to the plaintiffs' claim and allow it so far as it relates to the counterclaim. I would vary the order of the Supreme Court by discharging the declarations made upon the counterclaim. Some variation of the order as to costs below would be necessary in consequence of the dismissal of the counterclaim. I would dismiss the counterclaim with costs. As to the costs of the appeal a special order should be made if the appellant succeeds in part. On the view I have taken I think a fair order would be that the appellants pay two-thirds of the costs of the appeal.

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FULLAGAR J. This is an appeal from a judgment of the Supreme Court of Tasmania (*Morris* C.J.) pronounced in an action in which H. Jones & Co. Pty. Ltd., Clement Edgar Worsley and Eugene Albert Klingler were plaintiffs and the Municipality of Kingborough was defendant. The action was brought to restrain an alleged threatened infringement of riparian rights vested in the respective plaintiffs as owners of certain lands. Each of the plaintiffs owns land which abuts on the North West Bay River, which flows into North West Bay on D'Entrecasteaux Channel, some 15 miles south of Hobart. Each of the relevant Crown grants states the river as a boundary, so that (the common law being applicable) each plaintiff owns land between certain points "*ad medium filum aquae.*" The river is a substantial stream flowing in a natural and defined channel. It follows a winding course in a general south-easterly direction. The plaintiff company owns a large area of land on the north bank and a smaller area on the south bank. The two individual plaintiffs own comparatively small areas of land on the south bank. The greater part of the plaintiff company's land lies upstream in relation to the lands of the individual plaintiffs, but the whole of the plaintiff Worsley's land and a considerable part of the plaintiff Klingler's land have their river frontages opposite to part of the land owned by the plaintiff company. Apart from the plaintiffs Worsley and Klingler there is no riparian proprietor of land lower down the stream than the plaintiffs' land who is interested in the flow of fresh water in the North West Bay River.

The town of Margate, which is a town proclaimed under the *Towns Act* 1934 (Tas.) or corresponding prior legislation, is situate at the mouth of the North West Bay River, the river forming the northern boundary of the town. The town of Snug, another town proclaimed under the *Towns Act* 1934 or corresponding prior legislation, is situate some two or three miles to the south of Margate, also on the shore of North West Bay. Both towns and the whole of the land with which the action is concerned are in the municipal district of the defendant, the Municipality of Kingborough.

The plaintiff company and its predecessors in title would appear to have used water from the North West Bay River for irrigation purposes for many years. At the present time the company has some fifty-five acres under hops, about half of this area being on the north bank and half on the south bank. Water is taken from the river to irrigate the hops at three points. It is then turned into irrigation channels and distributed over the land.

None is returned to the river except such as may find its way back by seepage. The plaintiff company also carries on its land some 600 head of stock, sheep and cattle, which are watered from the river. The plaintiff Worsley uses water from the river only for domestic and stock purposes. The plaintiff Klingler, whose land is below Worsley's, uses that land as a seed farm and irrigates the land under cultivation (at present about forty to forty-five acres) by means of water drawn from the stream. The quantity of water flowing past the lands of the plaintiffs at different times and seasons, the quantities taken from time to time by the plaintiffs and their predecessors in title, the uses made of the water taken and the period of time during which the water has been used, were investigated in considerable detail at the trial before *Morris* C.J.

The council of the defendant municipality proposes to carry out, and has already commenced to carry out, a scheme for the supply of water to the towns of Margate and Snug and a considerable tract of country lying between those two towns. Such a purpose is " extremely desirable and laudable, but one to be attained not by violent means, or means not warranted by law, but by legal means " (per Lord *Cairns* L.C. in *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.* (1)). The scheme involves the construction of a weir on the North West Bay River some distance above the lands of the plaintiffs. From that weir water will be diverted and carried by means of pipes to the lands of the persons to be supplied in the two towns and the intervening territory. In fact the weir has been actually constructed and a number of pipes laid, but no water had been diverted from the stream at the time when this action was commenced. In adopting and proceeding to carry into effect its scheme of water supply the council of the municipality has purported to act under the authority of certain statutes of the State of Tasmania. It will be necessary carefully to examine these statutes, but it may be noted in passing that the learned Chief Justice referred to them collectively as " the water legislation of this State, which might now be termed a chaos." It is clear that, if the scheme is carried into effect, there will be a diminution of the flow of water past the lands of the plaintiffs below the weir. The probable extent of the diminution was in controversy. The Chief Justice said :—" It is apparent that the flow of the stream to the lands of the plaintiffs will be appreciably reduced by the defendant's scheme." But the evidence went, I think, considerably beyond this, and I think that his Honour

(1) (1875) L.R. 7 H.L., at p. 703.

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found much more than this. There was evidence that, when irrigating, the plaintiffs would use something in the vicinity of 1,000,000, gallons per day, that the capacity of the defendant's pumps did not exceed about 250,000 gallons per day, and that in February 1949 the stream carried about 1,600,000 gallons per day. But there was also evidence which strongly suggested (what one would imagine to be highly probable) that the flow of the stream varies greatly according to time of year and seasonal conditions. While at times, no doubt, much more than 1,600,000 gallons per day would flow down the stream, at other times there would most probably be considerably less, and this would naturally occur at dry periods when the plaintiffs' need of water would be greatest. These considerations, which have ample evidence to support them, explain, I think, the learned Chief Justice's finding that the plaintiff company's three intakes take, during the period from December to March, "all the water available and return none of it to the stream," and his later reference to "the present user by H. Jones & Co. Pty. Ltd., taking, as it does, all the available water and not returning it to the stream." The non-return of the water to the stream seems to me (as I shall explain later) to be something of which only a lower riparian owner could complain. I have referred to these two passages from his Honour's judgment only because I think that they show that the defendant's proposed works would not merely involve a sensible diminution of the flow of the stream but would interfere with the use actually made of the water by the plaintiffs before action brought. This is a matter which, whatever other relevance it may prove to have, must necessarily affect the discretion as to whether an injunction should be granted. The object of the action was to restrain the threatened diminution of flow and the plaintiffs (in substance) claimed (1) a declaration that the plaintiffs as owners of lands on the banks of the North West Bay River are respectively entitled to the waters flowing in a defined and natural channel into and forming part of the same as such stream and waters have been accustomed to flow down to the said land subject only to the ordinary and reasonable use of the said stream and waters by the riparian owners higher up upon the said stream; and (2) an injunction to restrain the defendant its servants agents or contractors from constructing the proposed works or obstructing or diverting the water of the said stream so as to interfere in any manner with the rights of all or of any of the plaintiffs as above declared.

The learned Chief Justice gave judgment for the defendant in the action, and, on a counterclaim by the defendant, declared

that the waters of the North West Bay River were vested in the defendant and that the plaintiff company was not entitled to divert and take from the river any waters other than those required for stock and domestic purposes and reasonable extraordinary purposes.

Now, one thing at least in this case is, I think, clear. The defendant, not being itself a riparian owner, would have at common law no defence against an action by riparian owners for relief in respect of an interference with the stream above their land which would have the effect of sensibly diminishing the flow of the stream to their land. At common law it would simply be in the position of a trespasser. It cannot justify what it proposes to do except by reference to some statutory authority. It does rely on two Tasmanian statutes, and I think it is best to begin by considering these.

It is convenient to consider first the provisions of the *Towns Act* 1934. Section 37 of that Act provides that the council may, with the consent of the Governor and subject to the provisions of any law determining the rights of the Crown and of riparian proprietors in the waters and bed of any lake, river, stream, or creek, take and divert from any lake or from any river, stream, or creek flowing through or in the vicinity of the town a sufficient quantity of water for supplying the whole or any portion of the inhabitants of the town with water for domestic purposes, and for supplying with water any public baths or washhouses, or any fountains or pumps within the town, and for the purpose of providing a supply of water for the extinguishment of fires in the town, or for motive power, or for supplying ships. The following sections confer upon the council necessary ancillary powers. They need not be set out in full or even summarized, but two points may be noted. In the first place, s. 38 refers to a supply of water within the town and s. 42 to supplying water to the inhabitants within such town. In the second place, there are elaborate provisions for the assessment and payment of compensation to persons injuriously affected by the construction and maintenance by the council of water courses, including persons who sustain damage by reason of the taking or diversion of any water.

In fact the consent of the Governor under s. 37 to the proposed scheme of water supply has not been obtained by the council of the municipality of Kingborough, but, if the proposed scheme were otherwise authorized by the *Towns Act*, I do not think that an injunction should go merely on the ground that the consent of the Governor has not been obtained. It appears that the

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consent has been applied for and has been refused, not on the merits, but because of the pendency of the plaintiffs' action: the consent may be forthcoming. But, apart altogether from the absence of consent of the Governor, the council's scheme in this case is in my opinion clearly not authorized or justified by the *Towns Act*. As Mr. *Eggleston* compendiously put it, it is "not a Towns Act scheme." Even if it be assumed that s. 37 authorizes a scheme embracing more than one town, it does not in my opinion authorize a scheme which includes, as this scheme does, the supply of water to lands outside the boundaries of any town. Correspondence and other evidence in the case indicates that an important factor in the scheme throughout has been a fish-canning factory, which is situate a mile or more from each of the towns of Margate and Snug and which is regarded as a potential consumer of a very considerable quantity of water. The proprietors of the factory are not inhabitants of a town within the meaning of s. 37, nor are the purposes of the factory or the purposes of the other owners of land between the towns of Margate and Snug among the purposes mentioned in s. 37. It may be noted (though doubtless this by itself is not fatal to the defendant) that the council does not appear at any stage to have regarded itself as proceeding under the *Towns Act*, and the approval of the Water Sewerage and Drainage Board, which must be obtained under the *Water Sewerage and Drainage Act* 1944 (Tas.) for any scheme of water supply, was not given to a scheme propounded as a scheme under the *Towns Act*. In my opinion, the threatened diversion of water of which the plaintiffs complain is clearly not authorized by the *Towns Act* 1934.

The other statutory provisions on which the defendant relies are those contained in Part XV. of the *Local Government Act* 1906 (Tas.). This Act, as originally enacted, abolished all rural municipalities established under the *Rural Municipalities Act* 1865 and all other existing local authorities and local authority districts, and provided for the division of the whole of the State of Tasmania, with the exception of the cities of Hobart and Launceston, into municipal districts, each municipality being incorporated and placed under the control of a council. The Act has been considerably amended from time to time, but not, I think, in any material respect. Part XV. is headed "Water District" and commences with s. 206.

Section 206 provides for a petition under the common seal of the council of any municipality to be presented to the Governor, praying that any tract of land within limits to be set forth in the petition and being within the boundaries of the municipality

may be constituted a water district. After certain formalities have been observed, the Governor may declare by proclamation that such tract shall be a water district, and, upon the publication of such proclamation in the *Gazette*, that tract is to be a water district within the meaning and for the purposes of Part XV. of the Act. It was in fact under Part XV. of the *Local Government Act* that the council proceeded. A petition was prepared and presented on 7th May 1947; the Governor proclaimed as a water district a tract of land comprising the towns of Margate and Snug, and the considerable area between the two towns to which I have referred above.

The section in Part XV. upon which the defendant directly relies for its authority to divert and take water from the North West Bay River is s. 209, and it is desirable to set it out in full. It provides:— "The council of each municipality shall have the care, control, and management of every water district within the municipality which heretofore has been controlled and managed by the council of a rural municipality or other abolished local body, and in them shall be vested every river, creek, or watercourse within the limits of every such water district and not vested by statute in any other authority, or excepted from the operation of this Part by a notification of the Minister in the *Gazette*; and subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river, creek, or watercourse, the council shall have the absolute control and regulation, so far as the same can be effected by artificial means, of the supply of water along and by every such river, creek, or watercourse within such limits. But nothing herein contained shall empower the council to place any obstruction in any navigable river, or to divert the water therefrom in any manner that would interfere with the navigation thereof." Sections 210-212 confer upon the council certain borrowing and rating powers in connection with water districts, and provide for the collection and enforcement of rates. Section 213 authorizes the council to enter upon land within the water district for the purpose of constructing locks, dams, wells, water channels &c., to take possession, subject to compensation, of any locks, dams or embankments already erected and to alter vary or regulate in such manner as may be prescribed the level or flow of water in any locks dams wells or works. The word "prescribed" means prescribed by regulation or by-law (see *Acts Interpretation Act* 1931 (Tas.), s. 7) and the words "manner prescribed" probably refer to s. 205 (15) (iii.) and (iv.), which confer upon the council certain by-law-making powers in relation to the supply of water.

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Section 214 authorizes the council to supply water on such terms as it may fix, and ss. 215 to 220 contain certain ancillary provisions.

Section 209, which appears to be the critical section for the purposes of the present case, involves a serious difficulty of construction. The expression "every *such* water district" in the first limb of the section would appear at first sight to refer only to water districts constituted before 1906 in "abolished" municipal districts, and the expression "any *such* river creek or watercourse" in the second limb of the section would appear correspondingly to refer only to rivers creeks and watercourses within water districts so constituted before 1906. It seems extremely unlikely, however, that this was intended, because s. 206 clearly contemplates and authorizes the creation of new water districts after 1906, and because s. 209 is the only section in Part XV. which gives to a council the very necessary power to regulate and control the sources of water supply within a water district. It is true that implications might be made from the other sections, and particularly from ss. 213 and 214, if they stood alone, but the very presence of such a section as s. 209 makes it highly improbable that it was intended to leave its subject-matter to implication in the case of all water districts constituted after 1906. The collocation of provisions creates an unmistakeable impression that the sections which follow s. 209 were intended to confer powers consequential on and in aid of the vesting effected, and the power of control given, by s. 209. Moreover, s. 208 seems to display a clear intention that Part XV. is to apply to water districts which may be created in the future. I think that the intention to deal with both existing and future water districts can fairly be collected from s. 209 read in its context, and I think that the word "such" should in each case be read as referring back only to "every water district within the municipality." The section then does two things. It gives to the council the control and management of existing water districts, and it goes on to provide, with respect to *all* water districts, for the vesting of rivers &c. in the council and the control and regulation of the supply of water by the council.

The section is, on any view, not merely awkwardly expressed: it deals awkwardly with the subject-matter. I do not think it necessary to explore its patent and latent potentialities. Construed as I have construed it, it would, in my opinion, if it stood alone, give to the council of the defendant municipality prima facie authority to divert the waters of the North West Bay River as it proposes to do, and the only remaining question would be as to the extent of the rights which are preserved to the plaintiffs

by the words which refer to the previously existing rights of any riparian proprietors. At this point, however, it becomes necessary to consider another statute.

The *Hydro-Electric Commission Act* 1929 (Tas.), was entitled "An Act to provide for the establishment of a Commission to manage and control the State Hydro-Electric Works; to provide for State control of all waters in lakes, falls, rivers, and streams, and to vest such control in the Commission; to empower the said Commission to regulate the use of such waters in certain cases." It provided by s. 49 that, subject to any rights lawfully held at the commencement of the Act (18th January 1930), the sole right to use waters in lakes falls rivers or streams should vest in the Commission, and that such sole right should be held by the Commission for the purposes of the Act. The Act of 1929 was repealed by the *Hydro-Electric Commission Act* 1944, which is a consolidating and amending Act and which now contains the material provisions. Section 65 of this Act provides that, subject to rights lawfully held on 18th January 1930, the sole right to use waters in lakes falls rivers or streams vested in the Commission by s. 49 of the Act of 1929 shall be held by the Commission for the purposes of the Act. Sub-section (2) provides that the Commission may, with the consent of the Minister, purchase rights to the use of water in lakes falls rivers or streams existing on 18th January 1930, and sub-s. (3) provides that the Commission may, with the consent of the Governor, acquire such rights compulsorily. Sub-section (4) provides that, if rights are acquired compulsorily, compensation is to be paid. Sub-section (5) provides that the provisions of s. 65 are not to apply to or in respect of any rights directly granted by any Act. That is to say, such rights are preserved and cannot be compulsorily acquired by the Commission. Section 66 provides that no right to the use of water in lakes falls rivers or streams shall be capable of coming into existence after 18th January 1930 by reason only of the enjoyment of such use for any period or of any presumption of a lost grant based upon such enjoyment. Section 67 provides that, to the extent to which the right to the use of water in any lakes falls rivers or streams is vested in the Commission, the Commission shall, if the Governor so directs and subject to such conditions as the Governor may determine, permit any person to be designated by the Governor to use such water for any purpose other than the generation of electrical energy. Section 68 provides that nothing in the relevant Part (Part XIV.) of the Act shall affect the right of any person to the supply of water for stock or domestic purposes or under the *Mining Act* 1929.

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It was contended for the plaintiffs that the effect of the provisions cited was to abrogate or deprive of any practical force or effect s. 209 of the *Local Government Act*. Those provisions it was said, took away from all persons and authorities any right or power which they might otherwise possess or acquire to use the waters of any river, and gave an exclusive right to use those waters to the Hydro-Electric Commission. It was contended for the defendant, in the first place, that the powers conferred upon the council by s. 209 were " rights directly granted by an Act " within the meaning of s. 65 (5) of the *Hydro-Electric Commission Act*. It was contended in the second place that the Commission had in fact granted a permit under s. 67 to the council to use the water for a purpose other than the generation of electrical energy, that is to say, for the purpose of supplying lands in the water district with water. It was said to follow that the provisions of s. 209 thereupon came into full operation and authorized what was proposed to be done. Apart from these two contentions, it was not, I think, seriously disputed that the power given by s. 209 of the *Local Government Act* could not be exercised consistently with the " sole right " given to the Commission by the *Hydro-Electric Commission Act*.

With regard to the first contention of the defendant I am of opinion that the powers given by s. 209 of the *Local Government Act* are not " rights " in any sense, and in any case are not " rights directly granted by an Act " within the meaning of s. 65 (5) of the *Hydro-Electric Commission Act*. An Act which confers, subject to certain conditions precedent, a power to be used for a public purpose cannot, I think, be said, if one is to have any regard to the appropriateness of language, directly to grant a right to anybody.

With regard to the second contention of the defendant, it appears that on 28th September 1945 the Commission granted permission to the defendant " to draw from the North West Bay River approximately one quarter million gallons of water per day." It does not, however, appear that the Governor directed that this permission should be granted. This, however, is not fatal to the contention, because a direction from the Governor may be forthcoming, and an injunction should not go unless it is clear that a direction will not be given. I have felt difficulty and doubt over the question whether s. 67 operates to enable the Commission to authorize statutory bodies to exercise powers in respect of water, the sole right to use which is vested in the Commission by its Act. The power given by s. 209 of the *Local Government Act* is given to the

council of a municipality. The word " person " is defined by s. 41 of the *Acts Interpretation Act* 1931 (Tas.) as including any body of persons, corporate or unincorporate, but the " person " to whom the permission may be given is a person " to be designated." It is not easy to regard a fluctuating body of persons, such as a council, as a " person " capable of being " designated." The whole framework, indeed, of s. 67 appears to me to be inapt to convey an intention that statutory powers in respect of water may be exercised if, but not unless, the Governor directs the Commission to grant permission for those powers to be exercised. I have, nevertheless, formed the opinion that s. 67 does authorize the giving of such a permission to use water as will authorize a council to exercise the powers given by s. 209 of the *Local Government Act*. The legislature has left that section standing on the statute book alongside s. 65 of the *Hydro-Electric Commission Act*, and there must be a strong presumption that it regarded the two sections as capable of working together and intended that they should work together. I do not think that any assistance is to be derived from the maxim *generalia specialibus non derogant*, but I do not think it is impossible to regard s. 67 as enabling the two sections to work together, and, unless it is actually impossible so to construe it, I think that it ought so to be construed. After all, when one is dealing with legislation so loosely conceived and drafted, a strict scanning of language is perhaps likely to miss what is intended to be conveyed. It may be said that s. 67 enables a right to be conferred upon a council in order that a power may be exercised, and, albeit with considerable doubt, I think that s. 67 should be so construed.

This position being reached, the plaintiffs must, if they are to succeed, maintain that the rights which they claim are preserved to them by the saving words of either s. 65 (1) of the *Hydro-Electric Commission Act* or s. 209 of the *Local Government Act*. In the *Hydro-Electric Commission Act* the words are " subject to any rights lawfully held at the commencement of this Act " (i.e. on 18th January 1930). A " permission to use " can only be granted under s. 67 " to the extent to which the right to the use of the water is vested in the Commission." Since the vesting is subject to the rights mentioned in s. 65, it may be that the permission could only confer a right or power subject to those rights. It may, however, be the correct view that the " permission " given under s. 67 to act under s. 209 makes the saving words of s. 209 the material words. Those words are " subject to the previously existing rights of any riparian proprietors to the use of the water flowing in any such river." It seems to me that the plaintiffs must be entitled to the benefit of *both* saving provisions, and are entitled to rely

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on whichever is the wider. It is necessary now to examine their rights as riparian proprietors.

The rights of riparian owners in Tasmania in respect of water flowing through or past their lands are not governed by statute as they have been in Victoria since the passing of the *Water Act* 1905. They are governed by the common law. As to the common law, the statement in *Halsbury's Laws of England*, 2nd. ed., vol. 33, at pp. 593-594, is, I think, entirely accurate. The learned author says:—"Every owner of a riparian tenement . . . on a natural water course flowing in a known and defined channel, . . . has as incident to his property in the riparian land a proprietary right to have the water flow to him in its natural state in flow, quantity, and quality, neither increased nor diminished, whether he has yet made use of it or not." He has also the right that the water shall *go from* his land without obstruction, but we are here concerned only with his right to have the water *come to* his land. Questions as to the nature and extent of this right commonly arise as between upper and lower riparian owners, and the prima-facie absolute right of the lower owner stated in the passage quoted is qualified by certain rights which every upper owner has at common law. Every such owner has, as against every lower owner "the right to take water from a natural stream for all ordinary purposes, namely *ad lavandum et ad potandum*, or for domestic purposes, such as drinking and culinary purposes, cleansing, and washing, feeding, and supplying the ordinary quantity of cattle on his land, etc." (*op. cit.* p. 595). So *Parke* B. in *Embrey* v. *Owen* (1), said:—"The right to the benefit and advantage of water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; . . . but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence." The right of an upper owner as against a lower owner would seem to extend beyond the "ordinary" use of water described above and to extend to some uses, such as irrigation, which are sometimes called "extraordinary" uses. Some doubt seems to attach to the extent of the "extraordinary" user which an upper owner is entitled, as against a lower owner, to make. I do not think, however, that for the purposes of this case it is necessary to consider this question: it may be noted that it was discussed in *Embrey* v. *Owen* (2) and in *Sampson* v. *Hoddinott* (3).

(1) (1851) 6 Ex. 353, at p. 369 [155 E.R. 579, at p. 586].
(2) (1851) 6 Ex. 353 [155 E.R. 579].
(3) (1857) 1 C.B. (N.S.) 590 [140 E.R. 242].

The relevant rules of law do not seem to have been settled in England until the decision of the Court of King's Bench in *Mason* v. *Hill* (1), where previous cases were reviewed and a passage in *Blackstone's Commentaries* considered. It is important, I think, to observe that, although one finds occasional references to the right of a lower owner against an upper owner as if it were merely a right to use water in certain limited ways, it seems to be established that it is not really a limited right to use water but a right to have the full natural flow of the water to him and to use it as he pleases, subject only to a limited right in every upper owner to use the water. Subject only to that (and, of course, to the rights of any lower owner) his right to have the natural or " accustomed " flow of the water is absolute, and his right to use the water as he pleases is absolute. In *Mason* v. *Hill* (2), *Denman* C.J., speaking for the Court, said :—"The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream, flowing in its natural course, *and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below*—that neither can any proprietor above diminish the quantity or injure the quality of water, which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant—and that, whether the loss, by diversion, of the general benefit of such a stream be or be not such an injury in point of law as to sustain an action without some special damage, yet, *as soon as the proprietor of the land has applied it* " (sc. the stream) " *to some purpose of utility*, or is prevented from so doing by the diversion, he has a right of action against the person diverting." (The italics are mine.) This contention of the plaintiff was accepted by the Court.

I think that the passage which I have quoted from *Mason* v. *Hill* (3) really settled the common law on the subject, and I think that it really governs the present case. Further authority, however, may be cited. In *Miner* v. *Gilmour* (4), Lord *Kingsdown* said :— " By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land ; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further,

(1) (1833) 5 B. & Ad. 1 [110 E.R. 692].
(2) (1833) 5 B. & Ad., at p. 17 [110 E.R., at p. 698].
(3) (1833) 5 B. & Ad. 1 [110 E.R. 694].
(4) (1858) 12 Moo. P.C. 131, at p. 156 [14 E.R. 861, at p. 870].

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he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

This passage has often been quoted. It was quoted notably by Lord *Blackburn* in *Orr Ewing* v. *Colquhoun* (1). It was referred to by *Bacon* V.C. in *Earl of Sandwich* v. *Great Northern Railway Co.* (2). The learned Vice-Chancellor in that case (2) referred to *Embrey* v. *Owen* (3) and *Miner* v. *Gilmour* (4) as establishing that " a riparian proprietor has a right to make all the use he can—to derive every benefit he can—from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself." The actual decision of *Bacon* V.C. in that case was overruled by the House of Lords in *McCartney* v. *Londonderry & Lough Swilly Railway Co.* (5), but it was overruled on the ground that the Vice-Chancellor had not given effect to the passage which I have quoted, and the decision of the House of Lords serves to authenticate and emphasize that passage. Cf. *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.* (6).

The cases which I have cited seem to me to establish clearly two things. The first is that—to use the words of Lord *Blackburn* in *Orr Ewing* v. *Colquhoun* (7)—the proprietor of land on the bank of a river " has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished." And the second is that this right involves—to use the words of *Bacon* V.C. in the *Earl of Sandwich* v. *Great Northern Railway Co.* (2)—the " right to make all the use he can, to derive every benefit he can, from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself."

It remains to apply these principles to the present case. The plaintiffs, for their various purposes, take at times all or most of the available water of the North West Bay River at places where it flows past their lands. But their use of the water does not interfere with the right of any upper riparian proprietor. And,

(1) (1877) 2 App. Cas. 839, at p. 855.
(2) (1878) 10 Ch. D., at p. 712.
(3) (1851) 6 Ex. 353 [151 E.R. 579].
(4) (1858) 12 Moo. P.C. 131 [14 E.R. 861].
(5) (1904) A.C. 301.
(6) (1875) L.R. 7 H.L. 697.
(7) (1877) 2 App. Cas., at p. 854.

because they are the lowest riparian proprietors, there is no lower riparian proprietor whose right is interfered with or who can complain of what they have been doing. Although their rights are several, they place themselves, by joining as plaintiffs in the action, in the position of the plaintiff in *Holker* v. *Porritt* (1). Of that plaintiff *Lush* J., speaking for the Court of Exchequer Chamber (2), said :—" The water which came down to him at the farm was his own to use it as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use which he chose to make of it there." Cf. *Ormerod* v. *Todmorden Mill Co. Ltd.* (3).

It may very well be that, for the purposes of the relevant statute, the plaintiffs' rights of user must be regarded as fixed as at the relevant date, which is, I think, under s. 209 of the *Local Government Act*, the date of the constitution of the water district. But the use which they were respectively making of the water of the river at that date was a use which they had a legal right to make and the right to make that use at least is a right which is saved by s. 209 of the *Local Government Act*. It has, I think, been established by the evidence and found by the learned Chief Justice that the proposed works of the defendant will interfere with that right. They are accordingly, in my opinion, entitled to a declaration and an injunction.

I think that the counterclaim is, on any view, clearly misconceived. The learned Chief Justice took the view that the only right preserved to the plaintiffs by s. 209 of the *Local Government Act* was the limited right of user to which an upper proprietor is entitled even though such user interferes with the natural flow to the land of a lower proprietor. I am, as I have said, unable to agree with this view. But, even if it were correct, the defendant could not possibly have any right to restrict the use made of the water of the stream by a proprietor of land below the place at which the defendant proposes to take off the water.

In my opinion, the appeal should be allowed. The plaintiffs are entitled to a declaration and an injunction, and the counterclaim should be dismissed. Since the exercise of the rights which, in my opinion, belong to the plaintiffs, necessitates at certain times every year the taking of all the available water, I think that the declaration and injunction should go substantially in the terms claimed, and I agree with the order proposed by the Chief Justice.

(1) (1873) L.R. 8 Ex. 107; (1875) L.R. 10 Ex. 59.
(2) (1875) L.R. 10 Ex., at p. 62.
(3) (1883) 11 Q.B.D. 155.

H. C. OF A. 1950.

H. JONES & CO. PTY. LTD. v. KINGBOROUGH CORPORATION.

Appeal of plaintiffs allowed with costs. Judgment of Supreme Court discharged. Declare that the plaintiff H. Jones & Co. Pty. Ltd., as the owner of the lands known as "Brookfield," the plaintiff Worsley as the owner of the lands known as "Willowbrook" and the plaintiff Klingler as the owner of the lands known as "Rocklyn" are respectively entitled to the use of the waters flowing in a defined and natural channel in the North West Bay River as such waters have been accustomed to flow down to the plaintiffs' lands subject only to the lawful user of the said waters by riparian owners higher up upon the said stream. Declare that the works under construction by the defendant and the scheme and undertaking proposed to be conducted by it for the diversion and supply of water from the said stream to residents in the townships and districts of Margate and Snug are contrary to the respective rights of each of the plaintiffs. Order that the defendant its servants agents and contractors be restrained from further constructing the said works and from obstructing or diverting the water of the said stream so as by such further construction or obstruction or diversion to interfere with the rights of the plaintiffs so declared. Defendant to pay the plaintiffs' costs of action. Appeal of H. Jones & Co. Pty. Ltd. as to counterclaim allowed with costs. Counterclaim dismissed with costs. Case remitted to Supreme Court with liberty to apply to Supreme Court.

Solicitors for the appellants, *Simmons, Wolfhagen, Simmons & Walch.*

Solicitors for the respondents, *Findlay, Watchorn, Baker & Solomon.*

J. R. R.