

Privy Council Appeal No. 80 of 1926.

The Colonial Sugar Refining Company, Limited - - - *Appellants*

v.

The Melbourne Harbour Trust Commissioners - - - *Respondents*

The Melbourne Harbour Trust Commissioners - - - *Appellants*

v.

The Colonial Sugar Refining Company, Limited - - - *Respondents*

(Consolidated Appeals).

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 18TH JANUARY, 1927.

Present at the Hearing :

VISCOUNT HALDANE.

VISCOUNT FINLAY.

VISCOUNT DUNEDIN.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

This is an appeal brought by special leave of His Majesty in Council from an order of the High Court of Australia in favour of the respondents, reversing an order of the Supreme Court of Victoria in favour of the appellants.

The appellants are the owners of a large sugar-refining factory on the banks of the River Yarra, a tidal navigable river within the limits of the harbour of Melbourne. The respondents are the Melbourne Harbour Trust Commissioners, in whom the Port of Melbourne, as described in the statutes under which they are constituted, is vested.

The question in the appeal concerns the title to (1) a wharf on the west bank of the River Yarra ; (2) a strip of land (hereinafter called " the northern strip ") lying to the west of the wharf ; and (3) a strip of land (hereinafter called " the southern strip ") lying to the west of another wharf, recently leased to the appellants by the respondents for a term which has now expired and as to which no question arises.

In the opinion of their Lordships, the real question to be decided in this appeal is whether under the circumstances of the present case the title of the respondents to the strips of land and the wharf in question has been extinguished under the provisions of Part II (relating to Limitation of Actions and Suits) of the Real Property Act of 1915.

The material facts may be shortly stated :—

In the year 1850 certain Crown lands, described as Allotment No. 4 of Section 8, in the parish of Cut Paw Paw on the west bank of the Yarra River (then called Hobson's River), and as bounded on the east by the river, were granted by the Crown to a predecessor in title of the appellants.

In the year 1873 the wharf was, with the consent of the representatives of the Crown, constructed by the then owners of Allotment No. 4 partly on the bed and partly on the foreshore of the river. It was completed towards the end of that year or early in 1874.

Shortly after the completion of the wharf the space on the landward side thereof was filled in with rubble or other material so as to bring it to the level of the wharf and was decked over. The space thus filled in is the northern strip.

Meanwhile, on the 7th July, 1875, the said allotment was acquired by the Victoria Sugar Company, who proceeded to erect thereon a sugar-refining factory. Portions of the factory buildings, known as old No. 6 and old No. 8, were erected on the northern strip, and the whole of the strip and the wharf were used and occupied by this company for the purposes of their business, and, after the acquisition by the appellants in the year 1888 of the property of the Victoria Sugar Company, have been so used and occupied by them.

The wharf is a solid timber construction, supported by piles driven into the bed or foreshore of the river and enclosed by horizontal baulks of timber fastened to the piles and decked over. On the northern strip and on the wharf there have for many years been lines of railway constructed by the appellants, or the Victoria Sugar Company, for the purposes of their business.

On the 1st January, 1877, the Melbourne Harbour Trust Act, 1876, hereinafter called the Act of 1876, came into operation. By this Act the Melbourne Harbour Trust Commissioners were created, and the port, as described in the Act, previously Crown land, was vested in them.

On the 4th July, 1890, on the application of the appellants, an amended certificate of title to Allotment No. 4 was issued, in which the land is described as delineated and coloured red on the

map in the margin containing 13 acres 3 roods $7\frac{7}{10}$ poles or thereabouts. The western boundary on the plan is Whitehall Street, and the western, northern and southern boundaries are marked with measurements in feet and inches. The eastern boundary is represented by an irregular line marked "River Yarra." Their Lordships agree with the findings in the Courts below that the description in the certificate does not include either of the strips in question in this action, and *a fortiori* does not include the wharf or any part of the site thereof.

In the year 1890, as part of a general consolidation of the Statutes of Victoria, the Melbourne Harbour Trust Act, 1890, herein referred to as the Act of 1890, was passed, repealing the Act of 1876 and vesting the port of Melbourne in the Harbour Commissioners under the new Act.

On the 20th March, 1890, the appellants wrote to the Commissioners a letter stating that it was their intention to erect a store No. 6, which would require to be built on a concrete foundation, enclosing a plan of what was proposed, and asking whether there was any objection on the part of the Commissioners. On receiving a reply to this letter to the effect that the Commissioners had no objection to the proposed work, the appellants proceeded to pull down the old Store No. 6 and to erect their new Store No. 6. The site of the new No. 6 is slightly farther back from the river than that of the old No. 6, but still includes a considerable part of the northern strip. It has for foundation a concrete wall on the northern and eastern sides. The floor of the old No. 6, so far as it is outside the limits of the new store, was left *in situ*, and constitutes a continuation of the decking of the wharf and the rest of the northern strip up to the new No. 6.

The northern strip and the wharf have remained unaltered since the year 1890, and have been continuously occupied and used by the appellants for the purposes of their business.

In the year 1895 an agreement was made between the Commissioners and the appellants whereby the Commissioners agreed to construct a wharf to the south of the old wharf and to lease it to the appellants for the term of 21 years, and it was a term of the agreement that the appellants should at their own expense fill in and reclaim the land behind the piling of the new wharf. This was duly effected, and the land so reclaimed is the southern strip.

Various buildings and other works have been erected by the appellants on portions of the southern strip, and the whole of such strip has since 1895 been in the exclusive possession of the appellants, who have used it continuously for the purposes of their business.

Their Lordships, for the purposes of this judgment, assume that, as against the Commissioners, the possession and use by the appellants of the wharf and of the two strips of land was without legal title, and that their title, if any, depends upon the Statute of Limitations.

The wharf and the two strips of land appear to have been used and occupied by the appellants in every respect and in the same way for the purposes of their business as the rest of their factory. The whole was enclosed on the landward side and was entered by gates shut and locked on Sundays, and there has been a gate-keeper there night and day, the public being thus excluded, except, of course, on the river side, where the wharf was open and unguarded, but it does not appear that there was any substantial use made of this mode of access by persons other than those who had business there in connection with the factory.

There is no evidence of any act of ownership on the part of the Commissioners or their representatives during the material periods. There is some evidence that as to the wharf it was regarded by officers of the Commissioners as private property. (See the letter of the Harbour Master to the Commissioners dated the 17th September, 1897, "Record," p. 218.)

On the facts above stated, their Lordships are of opinion that the continuous use and occupation by the appellants, and as to the wharf and the northern strip by their predecessors, and the absence of any acts of ownership by the respondents or their predecessors, ought to be held to amount to a discontinuance of possession on the part of the respondents and their predecessors. It is not easy to fix with precision the time when such discontinuance began, but in the case of the wharf and the northern strip the expiration of a year from the coming into operation of the Act of 1876 may fairly be taken as at all events approximately correct, in which case the period of limitation (15 years) expired in 1893. In the case of the southern strip the period commenced with the completion of the work in the latter part of 1895, and expired in the latter part of 1910.

The respondents, in opposition to this view, laid some stress on the uses at times of the wharf for the landing of goods other than those of the appellants and on the maintenance of an office for a Customs House Officer, but even if these events took place by direction of the respondents and their predecessors, which is not asserted by the respondents, this may well have been given under their powers of control and management vested in them and their predecessors by the several Acts of 1876, 1890 and 1915, powers which were not confined to land vested in them as owners but extended to all wharfs, docks, piers, jetties and so forth. (See as to this matter Record, pp. 49 and 101.)

As to the wharf, the construction of it was of such a nature as of itself to exclude the respondents from actual possession of every part of the site, although the water circulated through the interstices of the piles.

At the time, therefore, of the passing of the Act of 1890, the period of limitation, so far as concerns the wharf and the northern strip had, begun, but was not complete. As to the southern strip, the period began after the passing of the last-mentioned Act. As to all the lands in question, the period of limitation was complete

before the passing of the Act next to be referred to, and assuming the limitation section of the Real Property Act for the time being in force to apply to the circumstances of the present case, the title of the respondents had then been extinguished.

Under these circumstances the Melbourne Harbour Trust, 1912 (hereinafter referred to as the Act of 1912) was passed amending the Act of 1890 and reconstituting the Commissioners by the formation of a new Corporation.

Finally, in the year 1915, as part of a further general consolidation of the statutes of Victoria, the Melbourne Harbour Trust Act, 1915 (hereinafter referred to as the Act of 1915) was passed by which the respondents were constituted as successors of the previous Commission. The material provisions of this Act will be considered later.

As part of a scheme for the construction of a road on the western bank of the River Yarra, the respondents required possession of the two strips of land and of the wharf, and on the 19th August, 1919, purporting to act under section 54 of the Act of 1915, they gave to the appellants a notice that the licence or right (if any) held by or granted to the appellants or their predecessors in title to occupy, hold or use the wharf and the two strips of land was thereby cancelled and determined and that possession of the wharf and lands was required to be given to the respondents at or before the expiration of three calendar months from the date of the service of the notice.

The appellants thereupon commenced the present action, claiming, amongst other things, a declaration that they were entitled to the two strips of land and the wharf by virtue of the Statute of Limitations.

The action was tried before Mann, J., who, by his judgment delivered on the 12th September, 1924, decided on the point now in question that Sections 18 and 43 of the Real Property Act, 1915, had operated to extinguish the title of the respondents to the two strips of land. As to the wharf, he held that while the respondents had not been dispossessed of the water under the wharf, the appellants had, by virtue of the Real Property Act, 1915, acquired an easement of the right of retaining the wharf on piles by reason of their possession of the wharf.

By the formal judgment it was declared (1) that the appellants were entitled in fee simple to the two strips of land; (2) that the appellants were entitled to the perpetual use and occupation of the wharf, subject to the powers of management and control conferred upon the respondents by the Act of 1915, and subject to all public rights in or relating to the river; and (3) that the appellants were entitled as owners of the adjoining land to a right of easement over that portion of the river bed lying under the said wharf to have and keep the said wharf erected upon piles in the said portion of the bed in such manner as to offer no further obstruction than there existed to the flow of water beneath the wharf. A consequential injunction was granted

in effect, restraining the respondents from acting under the above-mentioned notice, or interfering with the possession or enjoyment by the appellants of any part of the land, and a counterclaim of the respondents asserting their title thereto was dismissed.

The respondents appealed from this judgment to the High Court of Australia.

On the 9th June, 1925, the High Court made an order allowing the appeal and discharging the judgment of the Supreme Court of Victoria, and in lieu thereof declared and adjudged (1) that the present appellants as registered proprietors of their allotment were entitled, subject to whatever powers, duties and authorities were vested in the respondents by the Act of 1915, to exercise the rights of a riparian owner over the two strips of land and the wharf; and (2) that otherwise the appellants' action be dismissed. On the counterclaim, a declaration of their title, as asked by the respondents, was made, and an order that they recover possession accordingly.

By an Order in Council dated the 1st February, 1926, special leave to appeal to His Majesty in Council was granted to the appellants.

The question then is, Have the appellants, by virtue of the provisions hereinbefore referred to, of the Real Property Act, 1915, acquired a title to the two strips of land and to the wharf, or any of them? As to the wharf, there is a further question. What is the nature of the title so acquired? Is it an estate in fee simple in the site of the wharf, or is it merely a right of user and possession and an easement of support, as held by Mann, J.?

As to the main question, the principal argument addressed to this Board by the respondents, and the only one with which it is really necessary to deal, was that the Act of 1915, conferred upon the respondents a new title to the strips of land and the site of the wharf discharged from any adverse title previously acquired under the Statute of Limitation or otherwise, and that in reference to the last-mentioned statute in particular the right to bring an action to recover the lands in question accrued to them for the first time upon the coming into operation of the Act of 1915, from which date the period of limitation ought to be calculated, and had, of course, not expired when they issued their notice above mentioned.

This argument raises a very important question as to the construction and effect of the Act of 1915.

An important factor in arriving at a solution of the question thus raised is that by the Acts Interpretation Act, 1915, passed on the same day as the Act of 1915, this Act is for the purposes of the Interpretation Act declared to be an Act consolidating Public Acts in force in Victoria on the 30th September, 1915.

The Consolidating Acts came into operation on the 1st October, 1915.

The Acts Interpretation Act, 1915, contains the following material provisions:—Section 6 (2): “Where any Act passed on or

after the 1st August, 1890" (the day on which the last preceding consolidation came into operation), "whether before or after the commencement of this Act repeals any other enactment, then unless the contrary intention appears the repeal shall not (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed"; and Section 33: "Subject to the said Consolidating Acts" (of which, as already stated, the Act of 1915 was one):

"All persons, things and circumstances appointed or created by and existing or continuing under the said public Acts at the said date" (viz., the 30th September, 1915) "shall continue unless and until other provision is made by and in accordance with law to have under the said consolidating Acts the same status, operation and effect as they respectively would have had if the said public Acts had not been repealed by the said consolidating Acts."

The words "subject to the said Consolidating Acts" must, in their Lordships' opinion, mean only that the operation of the section is capable of being excluded or modified by an intention to that effect expressed or necessarily implied in a Consolidating Act. They cannot mean that the provisions of the Consolidating Act, whatever they may be, over-ride and exclude the operation of the section. To give them this construction would be to strike out the section altogether.

The result is that if prior to the repeal by the Act of 1915 of the Act of 1890 and the Act of 1912, the title of the Commissioners to the land in question had been extinguished, and the right of the appellants thereto had been acquired, such right would not be affected by the repeal unless a contrary intention appears in the repealing Act. So, also, if the circumstances of continuous possession by the appellants and discontinuance of possession by the respondents had had on the titles of the Commissioners and the appellants respectively the effect just mentioned, these circumstances would continue to have the same effect under the Act of 1915 unless the provisions of section 33 were excluded or modified by the last-mentioned Act by express words or by necessary implication.

Before passing to the consideration of the material provisions of the Act of 1915, it is necessary to refer as shortly as may be to the previous legislation on the same subject, for it throws considerable light on the construction of the last-mentioned Act.

By the Act of 1876, the Melbourne Harbour Trust Commissioners were incorporated under that name, and (by section 47) it was provided as follows:—

"There shall be vested in the Commissioners upon trust for the purposes of this Act the bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in the 1st Schedule to this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the time of the passing of this Act,"

and to certain rights of Her Majesty which need not be further specified.

This was a vesting in the true sense, viz., that it transferred the lands, the subject of its text, from the Crown to the Commissioners. In the 1st Schedule the boundary of the lands so vested at the material point is described as running "southerly by allotments 1 to 7."

As already stated, their Lordships are dealing with the matter on the footing that none of the premises in question were included in Allotment 4, the property of the appellants, and these premises were, therefore, by the Act of 1876 vested in the Commissioners.

The Act of 1876 was amended in 1883, but the amending Act contains nothing material to the present question.

The next material event is the general consolidation of 1890. Of the Acts then passed those to be considered are the Act of 1890 already mentioned, and an Acts Interpretation Act, 1890. This latter Act contained a provision identical in terms with section 6 (2) of the Acts Interpretation Act, 1915, and a provision (section 32) to the same effect as section 33 of that Act except that the words "subject to the said consolidating Acts" in that section do not appear in section 32 of the earlier Act.

The Act of 1890 contains no general transfer of property from the Commissioners of 1876 to those of 1890, probably because the constitution of the Commissioners remained unaltered and the provisions of the Interpretation Act, 1890, were sufficient to affect such transfer. It contained two other material sections, 46 and 47.

Section 46 is in the following terms :-

"The bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Part I of the 3rd Schedule to this Act are hereby declared to have been vested in the Commissioners at the time of the passing of the 'Act of 1876' upon trust for the purposes of the said Act and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the date of the passing of the 'Act of 1876' and to the rights of Her Majesty mentioned in the last-mentioned Act."

Section 47 contains similar provisions with regard to certain lands added to the Port under the Amending Act of 1883.

The phrase "The Commissioners" is defined by the Act of 1890 to mean "The Melbourne Harbour Trust Commissioners," without reference to any particular statute appointing them.

In Part I of the 3rd Schedule to the Act of 1890, the boundary of the Port at the point in question is described in the same terms as it is in the Schedule to the Act of 1876.

By the Act of 1912 the Melbourne Harbour Trust Commissioners were reconstituted and a new body of Commissioners was incorporated, and by section 4 (1) it was provided that all property, real or personal . . . which immediately before the appointment of Commissioners pursuant to the Act of 1912 was vested in the Commissioners by the Act of 1890 or any other Acts or by any means whatever, should by virtue of this Act be and become

transferred to and vested in . . . the Commissioners appointed pursuant to the Act of 1912.

If it be correct to say, as has been said above, that by the time the Act of 1912 was passed the title of the Commissioners to the lands in question was extinguished, then such lands were not vested in the Commissioners immediately before the appointment of Commissioners pursuant to the Act of 1912, section 4 (1) of that Act had no operation upon them, and they did not under that section become vested in the last-mentioned Commissioners.

By section 2 of the Act of 1915 the whole of the Acts of 1890 and 1912 were repealed, and it was provided that such repeal should not affect a number of things therein enumerated, entered into, executed, or prepared under the said Acts or any of them before the commencement of the Act of 1915.

It was argued that the saving of the things enumerated was exhaustive. Their Lordships cannot accept this view. The operation of the Acts Interpretation Act, 1915, can only be excluded "if a contrary intention appears." The mere enumeration, as unaffected by the repeal, of things of a certain class cannot, in their opinion, be properly held to disclose a "contrary intention" within the meaning of the Act.

By section 3 it was provided that in the construction of the Act unless inconsistent with the context or subject-matter. "Commissioners" mean the Melbourne Harbour Trust Commissioners, viz., without distinguishing the various bodies of Commissioners from time to time constituted.

By section 11 it was enacted that all property real or personal . . . which immediately before the appointment of Commissioners under the Act of 1912 was vested in . . . the Melbourne Harbour Trust Commissioners by the Act of 1890, or any other Acts, or by any means whatever, should by virtue of the Act of 1915, be and become transferred to and vested in . . . the Commissioners appointed pursuant to that Act. This, of course, was a true vesting section, operating a transfer of the lands affected by it.

It has already been pointed out that the lands in question had by the operation of the Statute of Limitations ceased before the appointment of Commissioners under the Act of 1912 to be vested in the Commissioners, and they therefore were not by this section transferred to or vested in the present Commissioners.

Section 46 is as follows :—

"The bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Parts I and III of the 2nd Schedule to this Act, excluding therefrom the pieces or parcels of land within the metes and bounds described in Part II of the said Schedule, are hereby declared to have been vested in the Commissioners upon trust for the purposes of the said Act and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act but subject to the estate and interest of any persons in such pieces or parcels of land existing at the time of the passing of the 'Act of 1876';"

and to the rights of His Majesty specified in the last-mentioned Act.

Section 48 was as follows :—

“ Except as expressly provided in other sections of this Act, the exclusive management and control of the port, shipping, lightships, buoys, beacons, moorings, wharfs, docks, piers, jetties, ferries, landing stages, slips or platforms, lighthouses and the preservation and improvement of the port generally are hereby declared to be vested in the Commissioners and shall not be interfered with by any person whatsoever save and except ” as thereby specified.

In the 2nd Schedule the boundary of the port at the part in question is again described to be “ by the eastern boundaries of allotments 1 to 7.”

In considering the construction and effect of this Act, the Board is guided by the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.

The contention on the part of the respondents is that inasmuch as the lands in question are within the description contained in Part I of the 2nd Schedule, the effect of the words “ shall continue to be vested in the Commissioners ” is that, notwithstanding the extinguishment of the title of the Commissioners under the limitation sections of the Real Property Acts, the property shall remain for all time vested in the respondents ; in other words, that the provisions of the Real Property Acts as to limitation are not to apply to the lands in question. The contention is put in another way, viz., that the effect of the section is that under it the lands become for the first time vested in the respondents and that there is no person through whom they claim discontinuance of whose possession would affect them. The result is the same in which ever way the argument is framed.

Their Lordships cannot accept the contention. It is, in their Lordships' opinion, possible to give to the section a more reasonable construction, and one which would not have the effect of destroying private rights already acquired. The section which conveys to the respondents the property possessed by the previous Commissioners is section 11. Assuming, then, that the title of these Commissioners had already been extinguished by discontinuance of possession before the passing of the Act of 1915, section 11 of that Act passed no property in the lands in question to the respondents, and it is unreasonable to suppose that it was intended by section 46 to make a separate conveyance purporting to include those lands and in that way revive against the appellants a title already extinguished. It is unnecessary to give such a construction to the section. It is to be observed that it is obvious that some words have been omitted. The words “ upon trust for the purposes of the ‘ said Act,’ ” are meaningless unless a previous Act is mentioned. A reference to the corresponding section of the Act of 1890 makes it reasonably clear how the omission should be supplied. In the last-mentioned

Act, the words are " at the time of the passing of the Act of 1876," and it seems obvious that in the Act of 1915 a similar reference, either to the Act of 1876 or to the Act of 1890, has accidentally dropped out as the result of a copyist's error or in the printing, and that such a reference should be inserted between " Commissioners " and " upon trust " in line 24 of page 41 of the Appendix of Statutes. For the purposes of the present case, it is immaterial which of the two Acts is referred to, but it seems probable that the reference would have been to the last Consolidation, viz., to the Act of 1890.

Even without the insertion of any words, the construction of the section is reasonably clear. It seems to their Lordships that it is not a vesting section in the sense that it operates to transfer to the respondents any land at all. It refers to the vesting as a state of things already accomplished—as it had, in fact, been by " the said Act " (whether that be the Act of 1876 or the Act of 1890) in reference to the previous Commissioners, and by section 11 of the Act of 1915 in reference to the Commissioners under that Act, and declares the purposes for which that state of things had been so brought about.

The word " continue " merely expresses the fact that the state of things applies to the present Commissioners as well as to their predecessors and that the purposes for which it had been brought about in their case were the purposes of the new Act. It is true that on this construction the lands in question are referred to as vested in the present Commissioners, but this is merely an erroneous statement of fact, and ought not to be held to affect the rights of either the appellants or the respondents. In this view there is nothing in the section indicating an intention to exclude or modify the provisions of section 33 of the Interpretation Act. The circumstances existing under the Act of 1890 are to continue to have the same operation and effect as they would have had if the Act of 1890 had not been repealed. Among the circumstances existing under the Act of 1890 was the fact that as between the appellants and the respondents the title of the latter to the lands in question had been extinguished and that title is not revived by the Act of 1915.

Some stress was laid on the fact that the vesting is in section 46 referred to as subject to the interests of any persons in the lands mentioned existing at the time of the passing of the Act of 1876, and to the right of His Majesty already referred to. But this provision is taken from the previous Acts; there may have been some special reason for its insertion, but, in any case, it is not necessarily exhaustive.

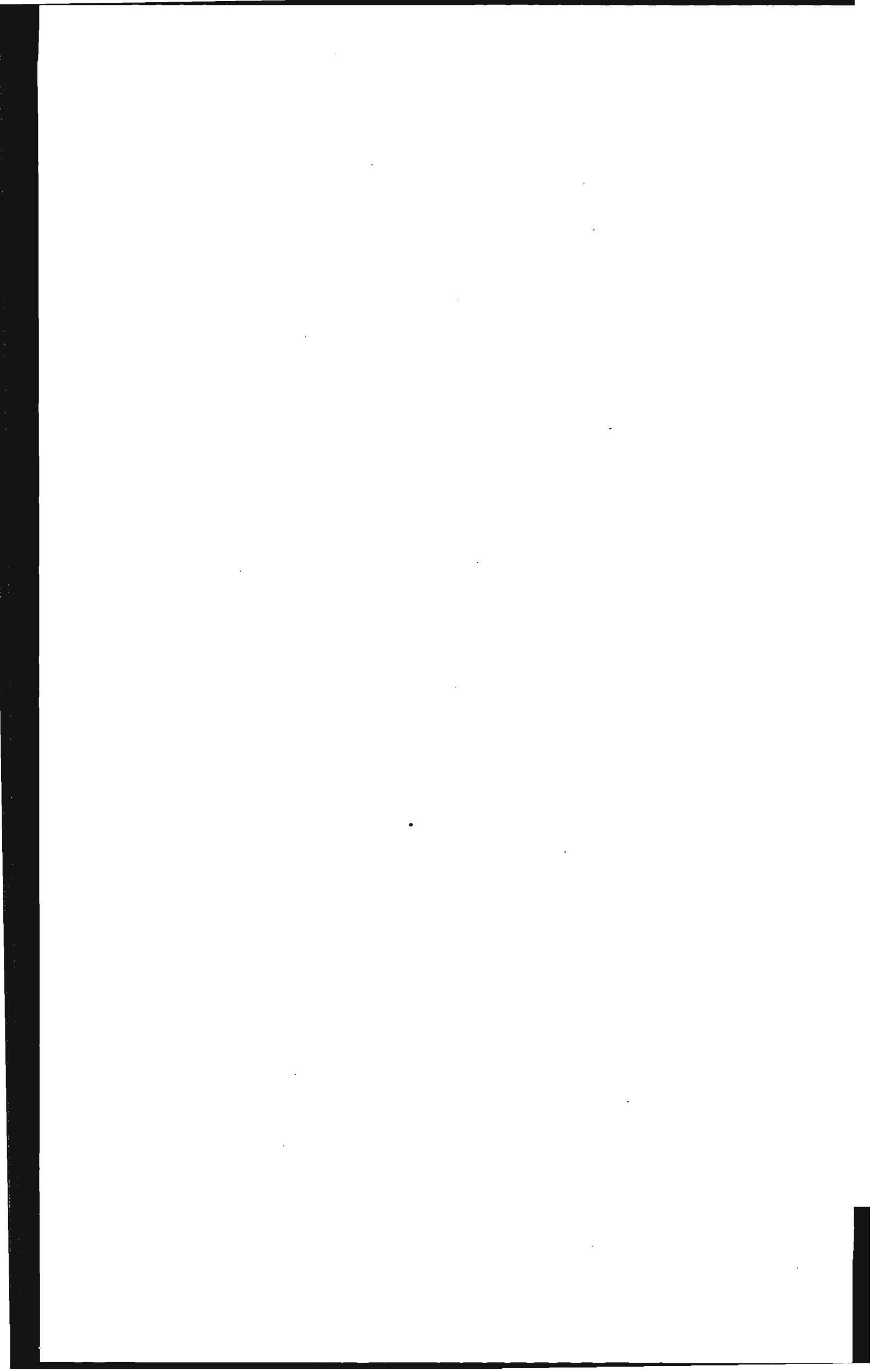
The argument that the respondents do not claim through previous Commissioners fails because, in their Lordships' view, they are by express statutory provision affected by the circumstances existing at the date of the transfer to them. At the same time their Lordships must not be taken to accept the contention

that, merely because the conveyance is statutory, they do not claim through their predecessors, within the meaning of the limitation clauses of the Real Property Acts. This last point, however, does not call for decision.

On the whole, their Lordships are of opinion that under the limitation section of the Real Property Act, 1915, the appellants have acquired a good title to the lands in question and, accordingly, that the appeal ought to be allowed, the order of the High Court of Australia discharged, and that of the Supreme Court of Victoria in substance restored. They think, however, that the latter order should be varied by omitting the two declarations 2 and 3, and inserting instead a declaration that the appellants are entitled in fee simple to the land parcel of the bed and foreshore of the river, being the site of the wharf, the subject matter of the action, and to the said wharf, but subject as in the present second declaration expressed, and so that they shall not be at liberty to increase the obstruction at present existing to the flow of the water beneath the wharf.

In making declarations Nos. 2 and 3, the learned Trial Judge appears to have thought that there could be an estate in the water as distinct from the land covered by it. This is a mistake. What the appellants have acquired is an estate in land covered with water, being the site of the wharf. Moreover it is difficult to see how such a right as is described in the second declaration could be acquired as an easement. It is really a right of ownership. It follows that the cross-appeal must be dismissed with costs.

Their Lordships will accordingly humbly advise His Majesty that the appeal ought to be allowed and the order of the High Court of Australia discharged, with costs here and below, and that the order of the Supreme Court of Victoria ought to be restored with the variation above expressed, and that the cross-appeal ought to be dismissed with costs.



In the Privy Council.

THE COLONIAL SUGAR REFINING COMPANY,
LIMITED

^{o.}
THE MELBOURNE HARBOUR TRUST COM-
MISSIONERS

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DELIVERED BY LORD WARRINGTON OF CLYFFE.

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