To be substituted for Judgment previously issued.

Privy Council Appeal No. 77 *of* 1911.

The Attorney-General of Southern Nigeria - *Appellant,*

v.

John Holt and Company (Liverpool), Limited, and others - - - - *Respondents,*

John Holt and Company (Liverpool), Limited, and others - - - - *Appellants,*

v.

The Attorney-General of Southern Nigeria - *Respondent,*

The Attorney-General of Southern Nigeria - *Appellant,*

v.

W. B. MacIver and Company, Limited, and others - - - - - - *Respondents,*

W. B. MacIver and Company, Limited, and others - - - - - - *Appellants,*

v.

The Attorney-General of Southern Nigeria - *Respondent.*

(*Consolidated Appeals.*)

FROM

THE SUPREME COURT OF SOUTHERN NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 9TH FEBRUARY 1915.

Present at the Hearing:

LORD SHAW.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD SHAW.]

These are two appeals and two cross-appeals, all consolidated, against two judgments pronounced by the Full Court of the Supreme Court of Southern Nigeria on the 22nd April 1911, varying the judgment of Osborne, C.J., pronounced on the 14th March 1910. For the

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sake of convenience the Attorney-General for Southern Nigeria is hereinafter referred to as "the Crown" and the opposite parties as "the respondents."

The proceedings relate to certain lands in the district of Olowogbowo, in the Island of Lagos, which became a part of the Colony of Southern Nigeria. The lands consist of five plots, all of which are situated on the shore of the lagoon. As commerce has developed, these lands, and especially the frontage thereof to the sea, have become of considerable value. They adjoin each other; and in the view which is to be taken of these appeals the facts as to the different plots may be sufficiently stated as follows: The respondent firm of Holt and Company were in occupation claiming as freeholders of (1) William's land and (2) Dunkley's land, and as tenants of the executors of the Reverend James White, who claimed to be the freeholders of (3) White's land. The respondents MacIver and Company were in the occupation of (4) George's land and (5) Johannsen's land as tenants of the freeholders of these respective plots. The whole premises were occupied for the purpose of the respondents' respective businesses as African merchants.

In regard to the possession and occupancy of the properties, the admitted facts are these: A wharf was built from George's land in or before the year 1859, a pier was built from Johannsen's land prior to the year 1861, and a pier was also built from Dunkley's land soon after that year. The respondents, it is further admitted, built stores, sheds, and other works at different dates upon the land adjoining the waterside, and in particular upon not inconsiderable portions of the solum of the land in question in the case, viz., that which had been

foreshore, *i.e.*, land between high and low water marks at ordinary spring tides. The respondents and their predecessors used the foreshore and land for storage and for the purposes of their business; and the wharf and piers already mentioned were also used by them in connection with their trade.

While upon the one hand there seems little doubt that for about half a century continuous use and possession were had—of the kind and nature just described—and that, as trade developed, additional buildings and erections were put upon the ground, yet upon the other hand it is admitted that this use and possession cannot be established for a period of sixty years.

To complete the general statement of the facts, it may be mentioned that a retaining wall was built to protect Dunkley's land prior to 1879, and that this retaining wall was continued in front of William's land in the years 1886–8. Further, as was stated on the appeal to the Full Court, there was no public right of way over the foreshore.

In the years 1907–8 the Government of the Island began the construction of a public road along the waterside of the lagoon. The road was continued over the lands in dispute in the present case. By this means the five plots belonging to the respondents have been cut off from the waters of the lagoon, and from their wharves and piers. By the construction of the road so made some of the stores, buildings, and sheds erected by the respondents or their predecessors have been destroyed, and the use and possession of the respondents' lands have been in an important degree subverted. It became, accordingly, necessary to determine the nature of the

rights of parties so as to settle the basis upon which compensation shall be made.

The form of the proceedings is by way of informations. It only requires to look at the prayer of these to observe the startling consequences which would result to all the respondents' properties should that prayer be granted as it stands. For it is prayed that a declaration be made of the absolute right of the Crown in the land in dispute, and for an injunction and peaceable possession. The result of this would be the complete extrusion of the respondents from land, foreshore, wharves, and piers. The properties themselves, instead of being properties abutting on the sea, would be separated therefrom by the road to be constructed, and be converted into hinterland.

Their Lordships are not surprised that the advisers of the Crown shrank from the consequences of this sweeping demand. The only substantial concession made, however, was that as to Dunkley's land and Johannsen's land, no Appeal was presented against that portion of the judgment of the court below which declared that the respondents' have acquired an easement for a jetty and a right of way thereto from these respective lands. Subject to this, the demand of the Crown is maintained in all its breadth.

This is the first time that process by way of information has been used in Southern Nigeria, and it is remarked by Osborn, C.J., that—

"It has proved exceedingly difficult to adapt to the
" Supreme Court Ordinance and the procedure rules there-
" under, which are framed to meet the requirements of a
" community wherein illiterate suitors not uncommonly
" conduct their own litigation."

Strict English procedure was accordingly departed from, and the courts went further in considering themselves not limited by the actual wording of the informations and pleadings. This occurred with the consent of both parties.

"What,"

said the learned Chief Justice,

"we are really asked to do is to ascertain and declare "what have been the rights of the respective parties from "the time of first occupation of their lands by their pre-"decessors in title, not only with regard to foreshore, but "with regard also to a strip of land which lies between "the limits specified in the various grants relating to the "defendants' lands, and the low-water mark of the "lagoon."

While it is true that this state of the record may import certain difficulties into the case, their Lordships pass no adverse comment upon the course taken by the parties and the courts below. And they desire to express their sense of the thoroughness and care with which the perplexing problems which emerge in the case, both upon the law and in fact, have been treated by all of the learned judges.

It appears from the historical narrative in the judgment of Osborne, C.J., that about 1850 Lagos, then under powerful chiefs, was one of the principal centres of the slave trade. It was bombarded in 1851 by a British force, and on the 1st January 1852 the slave trade was finally abolished. A British Consulate was established, and there was an influx of many liberated slaves from Sierra Leone and elsewhere. There seems no reason to doubt the opinion of the learned Chief Justice that the land had originally belonged to tribal communities, but that—

"During the decade between 1852 and 1862 the "practice of alienation sprung into vogue, and another

"new feature, totally foreign to native law, which knew
"not writing, was introduced in the shape of written
"grants by the King of Lagos. The land in Lagos was
"originally attached to the stools of the white cap chiefs,
"who were in no way subordinate to the early Kings."

In course of time, however, the royal power increased and the tribal and chieftain power diminished. This was the state of matters when King Docemo and his chiefs, on 6th March 1861, entered into a Treaty of Cession of the Port and Island of Lagos to Her Majesty the Queen of Great Britain.

The treaty is printed at length: the only question which has been mooted upon it is as to whether by its terms it granted sovereignty and jurisdiction alone to the exclusion of property. The words are complete and absolute, they—

"Grant and confirm unto the Queen of Great Britain,
"her heirs and successors for ever, the Port and Island
"of Lagos, with all the rights, profits, territories, and
"appurtenances whatsoever thereunto belonging, and as
"well the profits and revenue as the direct, full, and
"absolute dominion and sovereignty of the said port,
"island, and premises, with all the royalties thereof, freely,
"fully, entirely, and absolutely."

Their Lordships do not refer to the treaty further than to say that in their opinion property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors were to be respected. It may be that these required confirmation by subsequent procedure, prescribed by way of ordinance or otherwise, but no question on that head arises in the present case.

On 13th March 1862 the ceded territories, under the title of Settlement of Lagos, were

erected into a separate government. On 19th February 1866 Lagos became part of the West African Settlements. On 24th July 1874 the Gold Coast Colony, including Lagos, was formed. On 13th January 1886 Lagos again became a separate colony, and finally, on 1st May 1906, it became the colony of Southern Nigeria. This is briefly the political history of the island: but none of these changes, recorded in the judgments of the court below, effected any alteration in the status of occupants of land, or in the nature of the tenure thereof.

With regard to the plots of land in question in the present case, the one point which has a really important bearing upon the questions to be determined in the Appeals is as to the boundary seaward of those plots. On 21st January 1864 a Crown grant was executed in favour of Williams, who had been in possession for 12 years before, and the boundary on the south-west side of the property was stated to be the river Lagos. In 1861 there had been a grant of the next plot by King Docemo to a native called Captain Harry Johnson; Johnson sold to Dunkley, and in 1869 Dunkley obtained a Crown grant. There is a peculiarity as to the southern boundary, which is stated to be the "Marina," but it appears to be a fact that there was no "Marina" or public thoroughfare in that island, and, as the Chief Justice states, there is evidence that Dunkley himself had previously reclaimed some land and built a sea wall thereon as early as 1868, and that at the time he acquired the Crown grant he had a jetty or pier opposite his land. As to the third plot, the original grant was to the Reverend James White, in 1861, and in his Crown grant the western boundary is stated to be the lagoon.

The fourth plot, viz., George's land, was the subject of a grant from King Docemo, and the boundary is described as "facing the lagoon." The fifth plot, viz., Johannsen's land, is described as having a water frontage, and in an earlier agreement the property is said to include the ground on the beach.

Their Lordships do not investigate these titles in further detail. For in their opinion they are substantially at one in this, that the properties were each and all treated in description as being bounded in fact by the sea. The expression may be in one case the river Lagos, in another the lagoon, and so on, but a sea frontage was that which was meant, and in their Lordships' opinion was sufficiently expressed. They were riparian properties.

In the next place, in their Lordships' view, there was no express grant of foreshore made in any one of these titles, nor can any grant of foreshore be implied, looking to the language of description which is employed. Their Lordships are not moved by the fact that in some cases measurements are given; these would have to yield to the description. But the description itself is a water lagoon or sea boundary, and, as stated, this, in the opinion of the Board, does not embrace foreshore within the scope of the grant.

Before adverting to the state of possession of these properties, their Lordships think it right to allude to one fact with regard to the sea frontage. A swift current sweeps along the shore. The effect in the past has been to erode the coast, and it has been the practice in time past memory to erect upon the shore stakes or cabbage sticks to prevent the serious inroad and ravages of this tidal erosion. The practice was not only known to the British

Government, but so early as 1864 it was recognised, and indeed enforced, by an ordinance confirmed upon the 28th March of that year. A road had been made along a part of the riverside, and the owners of land abutting on the road were ordained, among other things, to drive in stakes in the bank of the river in such a manner as should be required by the Goverment surveyor—the narrative of the ordinance being that the road was liable to be put out of repair and the soil carried away by *inter alia* "the action of the tide at "the base thereof." The reason of the ordinance is stated to be the convenience and comfort of Her Majesty's subjects. There can, in the opinion of the Board, be little doubt that the erosive action of the sea was such along the coast of Lagos that a protection against it was considered not only to be for private but for public advantage.

Before stating the nature of the operations conducted by the respondents, their Lordships, in view of the argument presented to them, think it necessary to consider the possession of the properties, the descriptions whereof have been already alluded to, in reference to the doctrine of the accretion from the sea. In the first place, their Lordships are of opinion that when *de facto* the boundary was the sea under the different names already alluded to, there is nothing in the law or the nature of the case to prevent the application of the ordinary doctrine of accretion or dereliction to such a condition of things. On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had *de facto* been transferred to the Crown as owners of

the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained.

The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were *de facto* fronted and bounded by the sea, were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a stretch of land, it might be yards, feet, or inches, between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into hinterland, would be followed by grotesque and wellnigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage.

The whole of this question as applicable to lands *de facto* fronting a river but described by measurements which excluded its bed, was anxiously discussed in the case of *The Commissioners for Land Tax for the City of London* v. *The Central London Railway* (1913, A.C. 364). The law with reference to river and street boundaries of property was there gathered

together, and it need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil *ad medium filum* is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring do not in fact include any part of the bed of the river or of the street. Similarly, in their Lordships' opinion properties scheduled or specifically measured but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea. In the present case, accordingly, the conveyances of the properties which are in question in this appeal were in the opinion of the Board *habile* to cover the land formed by slow, gradual, and natural accretion.

Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt its general applicability to lands like those of the respondents' abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs.

There has been much written and decided law upon this subject, and notwithstanding the very full argument, it need not be entered upon at large. But in spite of the wealth of authority, including the dicta of Hale *de jure maris* and of many eminent judges, it is not clear that the general proposition has been advanced

beyond that laid down by Justinian in his "Institutes," Book II., Title I., section 20 :—

> "Præterea quod per alluvionem agro tuo flumen adjecit, " jure gentium tibi adquiritur. Est autem alluvio incre- " mentum latens. Per alluvionem autem id videtur adjici, " quod ita paulatim adjicitur, ut intellegere non possis, " quantum quoquo momento temporis adjiciatur."

> "As to lands,"

says Blackstone (Vol. 2, p. 261),

> " gained from the sea, either by alluvion, by the washing " up of sand and earth, so as in time to make *terra firma*, " or by dereliction, as when the sea shrinks back below " the usual water mark ; in these cases the law is held " to be, that if this gain be by little by little, by small " and imperceptible degrees, it shall go to the owner of the " land adjoining."

Blackstone then introduces by way of explanation a reference to a doubtful brocard *de minimis non curat lex*, which Lord Chelmsford in *The Attorney-General* v. *Chambers* (4 De Gex and Jones 66) properly disclaims. The true reason for the principle of law in regard to foreshores is the same reason as the principle in regard to river banks, *i.e.*, that it is founded upon security and general convenience.

In *Rex* v. *The Hull and Selby Railway* (5 M. & W., 332), Chief Baron Lord Abinger, referring to the case of *Yarborough*, says :

> "The principle there established is not peculiar to this " country, but obtains also in others, and is founded on " the necessity which exists for some such rule of law " for the permanent protection and adjustment of " property."

The case of *The Hull and Selby Railway* is important not only for the opinions of Lord Abinger and Baron Alderson but for the fact of its acceptance of this principle of the law (settled as between subject and subject) to the relations between the subject and the Crown.

"In all cases,"

said Lord Abinger,

"of gradual accretion, which cannot be ascertained from
"day to day, the land so gained goes to the person to
"whom the land belongs, to which the accretion is added;
"and *vice versâ*,"

and he repeats in different words his main proposition—

"No authority is needed for this position, but only the
"known principle which has obtained for the mutual
"adjustment and security of property."

Baron Alderson dwells specially upon the double-sided operation of the rule:

"I think,"

he says,

"the question is precisely the same, whether the claim
"is made against the Crown or the Crown's grantee.
"Suppose the Crown, being the owner of the foreshore—
"that is, the space between high and low water-mark—
"grants the adjoining soil to an individual, and the water
"gradually recedes from the foreshore, no intermediate
"period of the change being perceptible, in that case the
"right of the grantee of the Crown would go forward
"with the change. On the other hand, if the sea gradually
"covered the land so granted, the Crown would be the
"gainer of the land. The principle laid down by Lord
"Hale, that the party who suffers the loss shall be entitled
"also to the benefit, governs and decides the question."

In the case of *Chambers*, Lord Chelmsford refers to the double-sided operation of the rule in this way:

"It must always be borne in mind that the owner of
"lands does not derive benefit alone, but may suffer loss
"from the operation of this rule; for if the sea gradually
"steals upon the land, he loses so much of his property,
"which is thus silently transferred by the law to the
"proprietor of the sea-shore."

As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress.

"Considering,"

said Chief Justice Abbott,

"the word 'imperceptible' in this issue, as connected with "the words 'slow and gradual,' we think it must be "understood as expressive only of the manner of the "accretion, as the other words undoubtedly are, and as "meaning imperceptible in its progress, not imperceptible "after a long lapse of time."

This statement of the principle, viz., that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress, goes no further than the words of Justinian already quoted.

It was strongly contended before the Board that the facts of this case showed it to be substantially one of natural accretion. The argument was this. In accordance with the policy generally approved, stakes were set out between high and low-water mark, and the silting up took place within those stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes, and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the court below. More than one reference is made to "the question of the reclaimed or "silted-up land," and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting-up are, however, extemely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it

remains as before, *i.e.*, in cases like the present, with the Crown.

The history of the foreshore adjoining these lands, and of the operations thereon, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the courts below upon this question of fact. Upon the appeals Griffith, J., after referring to the finding of the trial judge, said :

"I have no reasonable doubt that the great bulk of "the land between the Crown grant land and the lagoon "is the result of artificial reclamation on the part of the "defendants and their predecessors."

Osborne, C.J., who had been the trial judge, put his judgment upon this point thus :

"The evidence seems clearly to show that actual "reclamation contributed more than alluvion to the exten-"sion of the lands in the occupation of the defendants "and their predecessors in title, and as to actual gain by "alluvion, uninfluenced by the defendants' and their "predecessors reclaiming operations, there is no direct "evidence."

The finding is thus not very specific, although Winkfield, J., goes the length of saying :

"It is not established that any part of the land neutral "tint on the plan was the result of natural accretion or "alluvion."

In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding. Nor do they say that they would have come to a different conclusion. The case accordingly must be dealt with as substantially one of an addition to adjoining lands being caused artificially by the execution of reclamatory work.

The natural situation of the land was that, consequent upon the erosion mentioned, a

relatively steep and inconvenient shore had been created. The reclamation mentioned undertaken by the respondents and their predecessors was not of the simple character of the erection of stakes, as alluded to, but was the building of a solid wall; and the evidence appears to point to the foundations of that wall having been sunk to the extent of at least a few feet in the soil between ordinary high and low-water mark, *i.e.*, in the foreshore itself. Nothing more natural could have been expected, and probably nothing more in the interest of all parties, including the Crown. The fact, however, being accepted as stated, the legal consequence follows, viz., that the doctrine of natural accretion cannot be held to apply.

The wall having been founded as stated, was built up; the land within it and the old high line cf foreshore was levelled; and the respondents and their prececessors have possessed the same ever since, that is, during a very long course of time, and they built thereupon from time to time the warehouses and sheds which appear upon the plans. The ground upon which these are erected protrudes largely over the disputed territory. Upon the new wall frontage itself wharfage accommodation was constructed; and the whole, viz., piers, wharves, disputed land and property within the old boundaries have been possessed together and used, roughly speaking, in this way for a period of between thirty and fifty years.

The judgment of the Full Court has affirmed various easements over reclaimed land (1) in the case of William's land for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and (2) and (3) in the case of Johannsen's and Dunkley's lands easements

for jetties. Against these last the Crown has not insisted at their Lordships' Board; but with regard to the first point it is maintained that such an easement is unknown to the law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof.

Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce v. Hay* (1 Macq. 305), by Lord St. Leonards, Lord Chancellor, who observed:—

"The category of servitudes and easements must alter "and expand with the changes that take place in the "circumstances of mankind."

But in their Lordships' opinion the second contention of the the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good

and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

There remains for consideration the judgment of Osborne, C.J., which was *inter alia* defended in argument by the respondents, and to which it was part of their case that this Board should revert.

The respondents are not in a position to plead the benefit of prescription, as, although their buildings and erections have been used and occupied for a time unquestionably long, it has, as already mentioned, not reached the requisite period of sixty years.

Their Lordships have been referred, on the other hand, to cases like the *Attorney-General for Ireland* v. *Vandeleur* (1907, Appeal Cases 369). But the facts of the present case cannot be subsumed under the category of lost grant. Although their Lordships are accordingly impressed with the long-continued possession, they are unable to discover in the law of England any acknowledged ground for holding that the property of the solum of the artificially reclaimed land has thereby become vested in the respondents.

A reference also was made to the case of *Phillips* v. *Halliday* (H.L. [1891], A.C. 228). But the circumstances of that case were

remote from the present. What was decided was that a pew may be annexed to a dwelling-house within a parish "either by a faculty or "by prescription, which supposes a faculty," and that a faculty might be presumed upon evidence of exclusive possession and repair for a long period.

A passage in the judgment from the opinion of Lord Chancellor Herschell is much relied upon; it is to the following effect:—

"In the case of *Rogers* v. *Brook*, Willes, J., a very "learned judge, said, referring to a possession of only "thirty-six years, that after so long a possession he would "presume anything in favour of the plaintiff. No doubt "that is a strong expression, and possibly there may be "presumptions that ought not to be made even under such "circumstances as those, but I think it points out how "emphatically the view has been entertained by learned "judges that where there has been long-continued posses-"sion which is consistent with a legal title, every reasonable "presumption ought to be made in order to support the "possession and maintain it as having been of right."

In the opinion of the Board this passage does not support the proposition, that a transfer of the dominium of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership. The effect of this upon the present case will be immediately seen.

As to the facts, the dates of reclamation have already been given and the nature of the erections, operations, and occupation stated. To all intents and purposes the reclaimed ground was used along with and as part and portion of the respondents' properties as a whole; and the piers, wharves, and whole land have been for the protracted period alluded

to, used for the purpose of the shipping and mercantile business. Their Lordships are further of opinion that the circumstances in which the reclamation itself was made negative all ideas of intentional trespass or of surreptitious acquisition of land. As stated, the respondents and their predecessors' acts of reclamation were good for all concerned, and were a public benefit. Their Lordships find themselves in agreement with Osborne, C.J., who tried the cause, and has submitted both facts and law to a thorough consideration, that—

> "It is quite impossible to believe that all the reclama-
> " tion and subsequent building can have gone on without
> " the knowledge and against the wish of the Government
> " . . . as the Government must have been aware of the
> " reclamation and subsequent building, it is more probable
> " that those acts were done with permission from the
> " Governor for the time being than that they were acts of
> " trespass done in defiance of the Government."

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation and to obtain an injunction which would extrude the respondents from the reclaimed land.

One result of no inconsiderable consequence would, of course, follow. The plots of land, all of which were bounded by the foreshore and the sea, would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation made as above described, not objected to, and followed by occupation ever since, would be the loss of all kinds of navigation, groundage, and other foreshore rights, and the destruction of probably the most serious elements of value in the whole of the respondents' properties.

Their Lordships are of opinion that this result is not in accordance with law. It may be that in building the foundation of the wall a stricter care should have been taken to keep on the landward side of the foreshore; but the foreshore, it should not be forgot, was exceptionally troublesome; the erosion was going on and the current was so dangerous that in native opinion there was a devil in the water. In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it should not be forgot that it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown. This principle is in accord with the law laid down in the *Attorney-General* v. *Tomline*, reported in 14 Chancery Division 58, and principally with the opinions of Fry, J. (12 Chancery Division 233), and Cotton, L.J. (14 Chancery Division 69).

With regard to the use and enjoyment of the made-up land by the respondents as merchants, their Lordships are, as already indicated, of opinion that the same cannot, in the circumstances, be subverted. As to what may be called foreshore rights, as such, the point of the case seems to be what is the effect of a frontage owner reclaiming part of a foreshore which is vested in another. It appears from the case of *Lyon* v. *The Fishmongers' Company* that the frontage owner has fore-

shore rights annexed to his land beyond such rights as he possesses as one of the public. And the real question, therefore, is whether the reclamation made in the circumstances before described operates as an abandonment of these rights over the land reclaimed. The abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case intended to convert their holdings into what has been described as "hinterland."

Further, it appears from the case of *Marshall* v. *The Ulleswater, &c. Company* (L.R. 7, Q.B., p. 166) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow and reflow of the tide.

The case has been brought in order to determine the principles upon which compensation shall be awarded to the respondents in consequence of the construction by the Crown of a road over the disputed land. Their Lordships desire to make it clear that it follows from their decision that the foreshore rights originally attaching to the respondents' lands before reclamation have accordingly not been destroyed thereby.

The lands further will fall, upon the case of compensation, to be treated upon the principle laid down in the *Duke of Buccleuch* v. *The Metropolitan Board of Works* (L.R. 5 H.L. 418), as possessing not only rights of navigation and otherwise in and enjoyable by the public at large, but those special rights which are attached and add value to specific riparian lands.

Their Lordships will humbly advise His Majesty that the judgment of the Full Court

should be set aside and the judgment of the Chief Justice in the court of first instance on the 14th March 1910 restored, except upon the point of costs. The Crown will pay to the respondents the costs of the appeals and of the causes in the courts below.

In the Privy Council.

THE ATTORNEY-GENERAL OF SOUTHERN NIGERIA

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JUDGMENT

DELIVERED BY LORD SHAW.

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