Judgment of the Lords of the Judicial Committee of the Privy Council on the two Consolidated Appeals of The Van Diemen's Land Company v. *The Marine Board of Table Cape* (*Nos.* 88 *and* 100 *of* 1903), *from the Supreme Court of Tasmania; delivered the 4th December* 1905.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.

[*Delivered by The Lord Chancellor.*]

The action out of which these Appeals arise was an action of trespass practically to try the right to a part of the foreshore of Emu Bay in Bass's Straits. Their Lordships are not able to acquiesce in the suggestion that the decision of this case has so wide and important a result as some of the learned Judges seem to have supposed. Nevertheless, it is of course important to the parties in its immediate result and the consequences which follow from them.

The facts which lead up to the question in debate may be shortly summarised. An Act of Parliament was passed in the sixth year of King George the Fourth (6 Geo. IV., cap. 39) for the purpose of encouraging the cultivation of waste lands in what was then the penal colony of Van Diemen's Land. It contemplated the granting of a charter to certain persons, and the Appellant Company was accordingly incorporated by Charter dated the 10th November

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1825. Subsequent legislation (10 & 11 Vict. c. 57) having authorized the grant to the Company of tracts of land, the real question now in debate is whether the *locus in quo* of the alleged trespass is included in a grant, dated the 27th July 1848, made in pursuance of that legislation.

The action was tried before Mr. Justice Clark and a jury at Launceston in Tasmania, and a verdict was found for the Defendants, the present Respondents. The argument appears to have wandered over a very wide field, but the direction of the learned Judge to the jury, which must have had great weight with them, was that the acts of user proved to have taken place over the *locus in quo* were of no importance, and in fact were not evidence at all, since they were acts which were antecedent in date to any grant made by the Crown. To understand the relevancy and importance of this direction it is only necessary to observe that both the Act 10 & 11 Vict., c. 57 and the subsequent grant recite that the Company had taken possession of the lands intended to be granted and incurred expense in the improvement thereof, and the grant is assumed to be of such a character that it neither expressly excludes nor expressly includes the *locus in quo*. It can hardly be doubted, in view of the recital to which reference has been made, that it was intended to authorize by the statute of Victoria the granting of a title to the Company of lands of which they had taken possession and upon which they had expended money, neither can it be doubted that the grant itself, when made, was intended to confer a title to what the Company had taken possession of, and so far from not being evidence, their Lordships consider user was very cogent evidence of what was intended to be granted. It certainly was not evidence, as the learned

Judge points out, of possession against the Crown, neither was it evidence of a lost grant. The learned Judge very satisfactorily disposes of both these suggestions, but it is difficult to understand why it was not evidence to identify the place the title of which the Crown intended to confirm to the Company.

It is quite true that if the language of the grant itself were absolutely plain and unambiguous, no amount of user would prevail against the plain meaning of the words (see *North-Eastern Railway Company* v. *Hastings*, 1900, A. C. 260). It is, however, impossible to contend that the language of this instrument can be so represented. The language is very wide, but when one finds such a recital as this: "the "Company have been authorized to take pos- "session of several portions of land, and have "ever since been and now continue in possession "thereof, but no grant thereof has been made "to the Land Company": when these are the circumstances under which the grant is actually made—why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it, and when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that what has been so taken and retained is cogent evidence of what is granted. When evidence of this character has been practically withdrawn from the jury, it is impossible to allow the verdict thus obtained to stand.

The circumstances under which modern user may be proved to explain a written instrument are treated of with great precision by the learned

Judges who advised the House of Lords in *Waterpark* v. *Fennell*, in 7th House of Lords Cases, 650.

The learned Judge stated, and stated quite correctly, that you cannot say that acts of user were acts of user under a grant when they were done before the grant existed. It does not follow that such acts were not relevant to be proved when, as in this case, they lead up to and explain what is afterwards granted.

It would be a singular application of the maxim quoted by Coke, 2 Institutes, 11, *contemporanea expositio est fortissima in lege*, to suggest that the proof of user must be confined to ancient documents, whatever the word "ancient" may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed.

The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to show the intentions of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant to the questions in debate.

Another direction given by the learned Judge to the jury and calculated to mislead them was his direction in relation to the leases of some part of the land in question. He suggested, not very obscurely, that the lease of part of the jetty which was leased and which extended over the foreshore was only evidence of an easement, and that the lessor of such a structure need not own the land over which such a structure was erected. That such a division might in point of law exist is nothing to the purpose. There was no evidence of any such severance of interest and the effect of such an

observation was well calculated to mislead the jury, who ought to have been told that such evidence was clearly evidence of seisin in the *locus in quo*.

Their Lordships do not think it desirable, as this case is to be tried again, to deal more minutely with the facts of the case, though they think it right to say that, as to the question of lost grant, or possession against the Crown, they would have been prepared to affirm the Judgments under appeal; but, reluctant as they have been to order a new trial where so much time has been spent and expense incurred already, and where so much learning and care have been bestowed upon the argument, they are unable to say that the question has been properly left to the jury. They will accordingly humbly advise His Majesty that the Judgments of the Supreme Court ought to be discharged, and that there should be a new trial, and that the costs in the Supreme Court ought to abide the result of the new trial. The Respondents will pay to the Appellants the costs of these Appeals.