Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brown v. *Mc Lachlan, from South Australia; delivered 21st December,* 1872.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE Appellant and Respondent are the holders of contiguous runs in South Australia, leased by the Crown for pastoral purposes. In 1870, the Appellant commenced an action in the Supreme Court of the Colony for the recovery from the Respondent of half the value of a fence erected by the former on the boundary line between the two runs. His right of action was founded on the 4th section of the local statute known as "The Fencing Act, 1865," which is in these words:—

"When any occupier of land has heretofore availed himself, or shall hereafter avail himself of any fence, not being a party fence, dividing such land from the land adjoining, the occupier in possession shall, upon demand, be liable to pay to the owner of such dividing fence one half part of the value at the time of such demand of so much of such fence as shall abut upon the land so occupied as aforesaid."

At the trial it was either admitted or proved that the Plaintiff was at the time of the erection of the fence, which was finished in June 1863, a tenant of the Crown for pastoral purposes, of the run called Avenue Range, and had continued to be so up to the date of the commencement of the action; that he had erected the fence on the boundary line; that the Defendant was, at the time of the demand,

occupier of the adjoining run known as Mount Scab; and before the demand had availed himself of the fence within the meaning of the Act; and, further, that the demand was duly made. And it is admitted that, in this state of things, the Plaintiff was entitled to recover, if he were the owner of a dividing fence within the true intent and meaning of the Act.

The jury, under the direction of the learned Judge who tried the cause, found a verdict for the Plaintiff, and assessed the damages at 184*l*. The Defendant afterwards, under leave reserved at the trial, moved for and obtained a rule to show cause why the verdict should not be set aside, and a new trial had; and, upon argument, the full Court, on the ground that the Fencing Act of 1865 must be held to apply only to land purchased from the Crown, and not to land held for pastoral purposes, ordered that the verdict entered for the Plaintiff should be set aside, and a nonsuit entered.

The Appellant being dissatisfied with this judgment applied for special leave to appeal on the ground that, although the sum in dispute was below the appealable amount, the question determined against him was one of general interest, and considerable importance in the Colony; and such leave was accordingly granted, but on the understanding that the appeal should be confined to the substantial question involved in the Judgment of the Court, and that no formal objection should be taken on the ground that the order was not for a new trial, but to enter a nonsuit.

The appeal has been fairly argued on that understanding, and the only question for their Lordships' determination is, whether the learned Judges of the Supreme Court were right in holding that the Statute does not apply to land held for pastoral purposes; or, in other words, that the Appellant was not the owner of a dividing fence within the meaning of the Act. If they are right, the foundation of the action fails. If they are wrong, the Appellant is entitled to retain his verdict, and to have judgment entered accordingly.

The object of the "Fencing Act, 1865," as declared in its preamble, was to repeal the Ordinance (No. 10, of 1846) which had been passed to encourage the fencing of land; and to make other

provisions in lieu thereof. It accordingly did repeal that ordinance, and enacted the provisions upon which the present question has arisen. It is, however, to be observed that the particular right upon which the Appellant's action was founded was not for the first time enacted by the latter statute. It is substantially the same as that given by the first section of the repealed ordinance to those who were within its operation. The Chief Justice, in delivering the judgment of the Supreme Court, stated that it had been conceded on the argument, that the ordinance could not apply to fences upon lands held for pastoral purposes. Mr. Field was at first inclined to question the correctness of this admission (if made); but, as the argument proceeded, it appeared that in 1846 when the ordinance was passed, waste lands occupied for pastoral purposes were held not under leases, but under mere licenses from the Crown; and that, consequently, it was impossible to bring the holders of such lands within the definition of an owner contained in the 4th clause of the ordinance. It is therefore now admitted that, when the fence in question was completed, viz., in June 1863, the Appellant could not have enforced under the then existing law any such right as he now asserts against the Respondent, or other occupier of Mount Scab; and further, that the ordinance having no application to the waste lands held for pastoral purposes, was designed only to encourage the fencing of lands of which the ownership had been or might be thereafter purchased from the Crown. The only question therefore is whether the Appellant has acquired the right on which he insists by force of the subsequently enacted "Fencing Act of 1865."

Much of the argument before their Lordships has turned upon the peculiar nature of the tenure under which, in this Colony, waste lands are and have been held under the Crown for pastoral purposes.

It is unnecessary to trace with particularity the legislation which has taken place on this subject by means either of Orders in Council, Imperial Statutes, Acts of the Local Legislature, or regulations promulgated by the Executive Government under some statutory authority. It is sufficient to state that the public documents admitted by the consent of the parties in evidence on the record, and the statutes to

which their Lordships' attention has been directed, seem abundantly to establish the following propositions:—

1st. That, ever since the first establishment of the Colony in 1834, there have been two distinct classes of real property: the first, consisting of land absolutely sold by Government to settlers and immigrants for agricultural or building purposes; and, the other, of the residue of the waste lands, the ownership whereof remained in the Crown, forming as it were the public stock by the provident use of which the future development of the Colony was to be secured.

2nd. That although the Crown has been in the habit of granting the temporary use and occupation of large portions of these waste lands for pastoral purposes, its power of doing so has always been jealously controlled; that, in the first instance, it granted mere licenses to depasture so many head of sheep or cattle without any definition of area, or the grant of an exclusive right in the soil; that when leases came into use its power of leasing was limited as to time (a limitation which, though enlarged from time to time, still exists); and that every lease so granted contained various conditions and provisions which went to restrict the powers of the lessees; to secure certain privileges for the aboriginal inhabitants and the general public; and, above all, to reserve to the Crown the right of resuming the lands in certain events for public purposes, one of such purposes being the absolute sale of any part of them to agricultural settlers.

3rd. That, in particular, such leases were made voidable whenever the lands comprised in them should be declared to be part of a hundred; it being in such case provided that so much of the land included in the hundred as might remain waste, should be subject to certain rights of common in favour of the proprietors of the purchased and settled lands in the hundred; and even when not required for that purpose should not be demised to a pastoral lessee for more than one year.

From this state of things it has naturally resulted, as was pointed out by Mr. Strangways, that the written law of the Colony has had a tendency to divide itself into two distinct classes, viz., Acts designed to regulate the permanent use and enjoy-

ment of the purchased lands, and Acts designed to regulate the temporary use and occupation of the waste lands, and especially to restrain the inprovident alienation of large tracts of such land.

The Ordinance of 1846 is admitted to have been exclusively a law of the former class.

It has, however, been argued that, inasmuch as the terms of the Fencing Act, 1865, are wide enough to embrace the tenants of the Crown under pastoral leases, that Act must be taken to apply to them unless they are excluded from its operation by express words, or necessary intendment; and that the Legislature in passing it, and in repealing the former Ordinance, must be presumed to have intended so to extend the provisions for the encouragement of fencing.

Their Lordships are not satisfied that this reasoning is correct. They conceive that, in dealing with a Statute which professes merely to repeal a former Statute of limited operation, and to re-enact its provisions in an amended form, they are not necessarily to presume an intention to extend the operation of those provisions to classes of persons not previously subject to them, unless the contrary is shown; but that they are to determine on a fair construction of the whole Statute considered with reference to the surrounding circumstances whether such an intention existed.

Mr. Field, indeed, contended that the intention might be presumed since the same motives which induced the Legislature to encourage the fencing of the settled and purchased lands, would make it desire to encourage the fencing of the waste lands leased for pastoral purposes; and he also relied on the stipulations in the renewed leases which bound the tenant to keep existing fences in repair. But there are many reasons why the Legislature should encourage the fencing of lands in a hundred parcelled out amongst small proprietors, and containing certain common lands on which such proprietors have a right of pasturage, which have no application to the construction of boundary fences between the vast districts demised for pastoral purposes for short terms of years. Moreover, the judgment under appeal suggests various reasons founded on the Crown's right of resumption; and on the conditions imposed on the lessees in favour of the aborigines and the public, which, if not absolutely

inconsistent with the existence of the supposed intention, do at least render it highly improbable. Again, the stipulations for the keeping up the fences are satisfied by supposing that they apply to such fences as are required for cattle or sheep pens, or other purposes connected with the use of the run. They do not necessarily imply a desire even on the part of the Crown to encourage the inclosure of vast tracts of waste land within boundary fences. And although their Lordships were referred to a late Act, No. 17 of 1869, of which the 33rd section contemplates the fencing in by pastoral lessees of areas of the demised land comprehending even twenty five square miles ; that enactment seems to show that the encouragement to such fencing consisted in a reduction of the rent payable to the Crown, and contradicts rather than confirms the notion that the Crown lessees were within the operation of the General Fencing Act of 1865.

Again, looking to the provisions of "The Fencing Act, 1865," itself they seem to their Lordships to afford strong grounds for the conclusion that it does not extend, and was never intended to extend, to lands leased for pastoral purposes.

One of the definitions of "the owner of a dividing fence" is "the person who, irrespective of this Act, by act of parties, is liable to keep such fence in repair." These words seem to point to a contract between a private proprietor and his subtenants, and hardly to include one between the Crown and its lessees. Again, as Mr. Strangways pointed out, the fence contemplated is "one ordinarily capable of resisting the trespass of great cattle." It need not, in the first instance, be a fence capable of resisting the trespass of sheep, though, after it has become a party fence by the operation of the Act, or otherwise, it may be made so capable by either of the part-occupiers under section 6. Yet it would seem that the majority of runs are depastured by sheep more generally than by large cattle; whereas, on the common lands in the settled hundreds, large cattle are found in greater numbers than sheep.

Stronger arguments against the Appellant's construction of the Act are, however, to be found in the following considerations. If the Act applies to lessees for pastoral purposes, then the Crown, at the expiration of the lease of one of the runs, may

find itself subject to all the liabilities which attach to the owner of land bounded by a party fence. Such a consequence, if intended, could hardly fail to be expressed. And, if the Crown were not so bound, the occupier who had availed himself of the fence might incur the burthen of paying half its cost without reaping the corresponding advantage.

Again, it is clear that, under the 4th section of the Act, if it is taken to apply to the lands leased for pastoral purposes, an occupier of such land might be retrospectively subjected to liability which, but for the Act, he would not have incurred. In the present case it is no doubt true that, though the fence was erected before the passing of the Fencing Act, the Appellant's right of action is founded on an act done by the Respondent after the date of the Act, in order to avail himself of the fence. But it might have been otherwise. The 4th section says: "When any occupier of land has heretofore availed himself, or shall hereafter avail himself of any fence," &c. This provision is reasonable if it is limited to those who, under the repealed ordinance, would have incurred a similar liability. But it is hardly reasonable to suppose that the Legislature intended by the clause in question to impose retrospectively a new liability on the occupiers of pastoral runs.

It does not appear to their Lordships to be necessary for the determination of this appeal to go the length of affirming the opinion expressed by the learned Chief Justice, to the effect that the erection of such a fence as that in question was an actual violation of the Crown leases, and that both the party erecting it and the party availing himself of it were wrong-doers, a proposition which their Lordships think is extremely doubtful. But for the reasons above given they are of opinion that the conclusion to which the Court unanimously, and with all the advantages of local knowledge, came upon the argument of the rule, viz., that the Fencing Act, 1865, does not apply to land held for pastoral purposes was correct; and they will accordingly humbly advise Her Majesty to affirm the Judgment, and to dismiss this Appeal with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—23/12/72