Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Municipal Council of Sydney, the Agricultural Society of New South Wales, and the Sydney Driving Park Club, Limited, v. *The Attorney-General for New South Wales and Henry Thomas Milroy, from the Supreme Court of New South Wales; delivered 9th June* 1894.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.

[*Delivered by Lord Hobhouse.*]

The main question in this appeal turns on the effect of a dedication of Crown land in Sydney made by the Crown in the year 1866 under the powers given by the Act of 1861 (25 Vict. No. 1) for regulating the alienation of Crown lands. By the decree appealed from, certain arrangements made or permitted by the Appellants the Municipal Council of Sydney for the purpose of allowing agricultural shows and races to be held by the other Appellants on a portion of the dedicated land are declared to be void, and injunctions have been granted to prohibit them. The Attorney-General of New South Wales, who appears as a Respondent, seeks to maintain the decree on the ground that the land is dedicated as a pasturage common and cannot lawfully be used for other objects.

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The Crown Lands Alienation Act defines Crown Lands to mean “All lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted or lawfully contracted to be granted in fee simple.” And by sect. 5 it enacts that “the Governor with the advice aforesaid” (the advice of the Executive Council) “may by notice in the Gazette reserve or dedicate in such manner as may seem best for the public interest any Crown lands for”; then follow a number of specified purposes, ending with “or for any pasturage common, or for public health, recreation, convenience, or enjoyment, or for the interment of the dead, or for any other public purpose.”

A notice was published in the Government Gazette, under date the 5th of October, 1866, as follows:—

“Department of Lands, “(2362)Sydney, 5th October, 1866.

His Excellency the Governor, with the advice of the Executive Council, has been pleased to dedicate the Crown lands hereunder described to the several public purposes mentioned in connection therewith, abstracts of such intended dedications having been duly laid before Parliament in accordance with the 5th section of the Crown Lands Alienation Act of 1861.

J. Bowie Wilson.”

Then follows the schedule relating to many parcels of land, and among them the parcel now in dispute. Its place is mentioned as Sydney, its extent as 490 acres, and its purpose as “permanent common.”

The Public Parks Act of 1854 (18 Vict. No. 33) recites that it “is expedient that bodies of trustees with perpetual succession should be created for the purpose of holding, managing, and protecting lands granted for or dedicated

" to purposes of public recreation health con-
" venience or enjoyment." It enacts that the Governor may without any grant by the Crown appoint Trustees of lands so dedicated, and that they shall be a body corporate. And by Section 5, "The Trustees appointed by virtue " of this Act shall have the powers of absolute " owners (except for the purposes of alienation " in respect of the land granted to or placed in " trust under them) and it shall be lawful for " them to make such rules and regulations for " the protection of the shrubs trees and herbage " growing upon such lands, and for regulating " the use and enjoyment of such lands, and for " the removal of trespassers thereon and other " parties causing annoyance or inconvenience " thereon, as to them shall seem necessary or " expedient."

A notice was published in the Government Gazette under date, Department of Lands, Sydney, 15th August 1871, as follows :—

" (1782.)

" It is hereby notified for public information " that His Excellency the Governor, with the " advice of the Executive Council, has been " pleased to approve of the appointment of the " Municipal Council of Sydney as trustees of the " portions of land in the City of Sydney dedicated " for public recreation the particulars of which " are set out in the accompanying Schedule.

" J. Bowie Wilson.

" (Nos. 71, 1121.)"

The schedule contains the 490 acres in question. They are there stated to have been dedicated by notice in the Gazette, 5th October 1866.

On the 5th September 1881 the Municipal Council executed a deed whereby they purported to let to the Agricultural Society of New South Wales about 25 acres of land situate at Moore

Park, Sydney, at a yearly rent of £10. The lease is to endure from the 1st of July then last during the will of the lessors only, or until notice given as therein mentioned. The lessors may determine the tenancy after fourteen days' notice in writing. The lessees are to hold the demised land for the purpose only of shows or exhibitions, and they undertake to keep the land drained and cleaned under the directions of the lessors' engineer, and to comply with the lessors' regulations as to access by the public.

The demised twenty-five acres are part of the dedicated land, which appears to be called “Moore Park.” According to the evidence they are a low-lying portion of the ground, very wet and swampy when taken by the Agricultural Society, who have drained them and made them fit for use. It appears that they are fenced round in some way, and that the enclosure can be entered at some points by turnstiles or by a carriage-way, at both of which payment is made for entrance, and from another direction by gates which can be passed without payment. Within the enclosure the society hold their agricultural shows, and by arrangement with them the Driving Club hold pony races. It is stated that the expense was borne half by the society and half by the Government.

The condition of things is stated by Mr. Webster, the secretary of the society, whose evidence does not appear to be contradicted. He says:—

“It (the land) was very rough and trees growing on it, and considerably below the level Moore Park had been made up to. It was all a swamp. At the first show the centre of the ground was three feet under water in 1882. The society has filled it in and well drained it. It is now fairly dry. Stables and pens erected. Pavilions and offices. All the requirements for a first-class agricultural show. The cost was £32,000 since 1881. That included the Government subsidy of £1 for £1.

The Government gave £5000 when the land was first taken up on condition that £1 for £1 was obtained. The £5000 was given to start it. Ponies compete for prizes given

at our show, just as we have jumping competitions. It is not true that people are totally excluded without payment.

"There are turnstiles where people pay for going in. There is also a gate on the Moore Park or Randwick Road side and one on the Rifle Range without any turnstile. Through these gates the public can go without payment. They are always open. The turnstiles register everybody who goes through, and so we can see what cash the turnstile man takes, so much for adults and so much for children. There were over 50,000 people at the last show. 46,000 paid. Subscribers and exhibitors, soldiers, and sailors do not pay. Wednesday is the Driving Park day. Saturday, cricket in summer and football in winter. The admission is 1*s.*, ordinary matches 6*d.* The members' gate and other gates are always open. When no football, cricket, or trotting matches are on, the grounds are open; very few of the public go in, one or two."

The same witness shows that other parts of the 490 acres have been appropriated in similar ways for cricket and football and for Zoological Gardens, the practice apparently beginning soon after the appointment of the Municipal Council as trustees. Speaking in 1892 the witness says "this has been going on "for 17 or 18 years." No question is raised in this suit as to such other parts, but the nature of the dedication must affect all alike.

In October 1891 an information on the relation of the Respondent Milroy joined with a claim by him was filed against the three Appellants. It states that by the notice of the 15th August 1871 the Governor duly dedicated the lands to the purpose of public recreation. It complains that members of the public, including the Plaintiff, who desire to enter the demised 25 acres for the purpose of public recreation, are prevented from doing so. It prays a declaration that the 25 acres are held by the Municipal Council upon trust for the purpose of public recreation only, the avoidance of the lease, and injunctions to restrain the exclusion of the public and the exaction of payment.

The learned Chief Judge in Equity who heard the cause held that the rights of the

public and of the parties turned upon the construction of the dedication of 1866.

On that point his opinion is stated as follows:—

“The 5th section of the Crown Lands Alienation Act, under which this dedication is expressed to be made, authorizes the dedication of Crown lands as a ‘pasturage common.’ And such it is clear this common must be. In England there are various kinds of common, such as a common of fishing in rivers or lakes; a common of turbary, conferring the right of cutting turf; a common of estovers, conferring a right to lop timber; and a common of right to dig for coal, minerals, and the like; but the most usual form of common is that of pasturage, and unless it be otherwise expressed a dedication of grass land as a common can only mean a common of pasturage.

It was contended that the words in this dedication ‘permanent common’ meant only a place of public recreation.

I am clear they have no such meaning.”

As for the difficulty that no commoners are specified, he meets it by holding that the rights of a common are necessarily limited to those who live in proximity to the common. As regards the frame of suit, he holds that the Crown is in the position of the lord of an English manor; that it has an equal right of pasturage age with the commoners, and can sue for itself and the commoners who claim under it. The plaintiff's claim he thinks to be a mere sham, and he dismisses it with costs. He does not discuss the difference between commoners and the public, or the circumstance that his view is as adverse to the view of the dedication which is taken by the information as to that which is taken by the defendants.

The decree declares that the twenty-five acres form part of the common dedicated by the notice of the 5th of October, 1866, and that the lease of September, 1881, is void. It directs the lease to be cancelled, and it restrains the lessees and the Driving club from excluding any member of the public from the twenty-five acres or any part thereof at all reasonable times, and from making any charge

to any member of the public for entrance thereto.

It is to be remarked that the decree does not declare the 25 acres to be subject to common of pasturage. It declares it to be part of the common established in 1866, which nobody has disputed. By reference to the learned Judge's reasons we find that he interprets the Gazette of 1866 to mean common of pasturage. But then the decree goes on to protect the public only, not the commoners nor the lord. Now if the common is for pasture, and belongs to those who are in proximity, it is difficult to see why the public should have a decree made on their behalf invalidating the transactions in question. The decree seems to rest partly on the ground that there is common of pasturage to be protected, and partly on the ground that the Attorney-General sues on behalf of the public, and not on behalf of the lord or of any commoners. The first ground is inconsistent with the case presented by the Information, and the second is inconsistent with the view taken by the learned Judge.

Passing from these objections and adopting for the moment the supposition that the land was dedicated to pasturage, in what position has the Crown placed itself? The view submitted by the Solicitor-General for the Respondents is that the dedication of 1866 is an incomplete act capable of being made complete afterwards; that it is valid and indefeasible so far as it devotes the land to common of pasturage; and that, though subsequent declarations may show who are the commoners and what are their rights, the Crown cannot make any disposition inconsistent with the dedication.

Even if that view be right, how does it support the case made by the Information? The Crown remains the legal owner of the land, and has not designated any other person to

to possess any interest in it. Until such designation it is surely open in the meantime to the Crown to use the land in any way not inconsistent with its ultimate use for pasturage. What the Crown has done is to treat the land as a recreation ground, to appoint trustees for it on that footing, and to encourage and assist with money the acts that are now complained of. So long as there is nobody interested in the pasturage except the Crown itself, what legal objection is there to this course? The municipal council are only doing what the Crown intended them to do; and their Lordships cannot see what right the Attorney-General has to sue on behalf of the public or of the Crown to restrain them.

Their Lordships feel that the issues dealt with are not the principal ones, and they prefer to rest their judgment on the broad ground that the dedication of 1866 does not create a common of pasturage. If it was intended to create such a right, why should not the Crown have used the statutory expression for it? Its advisers preferred to use a term not to be found in the statute, and yet susceptible of a popular and intelligible meaning. The word “common,” it is true, has a technical meaning in England and in New South Wales; though what kind of enjoyment it may indicate, and for what persons, cannot be understood without something more. Standing alone it is an ambiguous term which requires explanation, and which may be explained by circumstances. But further, it is very often used, though inexactly and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people. And the question is whether it has not been so used in this instance.

It appears to their Lordships that there are several considerations, some more and some less cogent, all bearing the same way. The

departure from the words of the Statute, though consistent with the ultimate use of the land for pasturage, suggests that the Crown had not then any intention of irrevocably fastening upon the land any of those precise modes of enjoyment which the Statute mentions. The omission to name commoners, or in any way to define the nature of the common, is more consistent with the intention of leaving the enjoyment a variable thing and open to all comers, than to give it to a defined class which even if a large one must be limited. The contiguity of the land to a populous city suggests that other modes of enjoyment are more suitable than pasturage. Five years after the dedication the Crown, by an equally formal document, treats it as one made for public recreation; and proceeds to appoint trustees accordingly. Since the appointment of trustees, at least for 17 or 18 years, the use of the land for different purposes of enjoyment has been constant. It is not a long user, but it has never been disturbed by any claim for pasturage. How strong was the general understanding that the land was actually dedicated to public recreation is shown by the Information itself, which prays a judicial declaration to that effect, and founds its complaint on the Defendants' interference with the public enjoyment. Their Lordships find no trace of any contrary view before the delivery of the judgment in this case.

For these reasons they hold that the view taken by the advisers of the Crown and by the authorities and the people of Sydney is also the true legal view; and that the dedication of 1866 in permanent common means that the land is to go for ever for the common or public enjoyment, so as to bring it within the operation of the Public Parks Act.

If that be so, the appointment of trustees in 1871 is valid, and the only question that remains

is whether the municipal corporation has dealt with the land in a way which is authorized by the powers conferred on them by the Parks Act. On this point no complaint has been made at their Lordships' bar, and it does not appear that there is any dissatisfaction among the people of Sydney, who might shew it, if felt, very effectually in their municipal elections. There is a very general liking for animal shows and races, and a general willingness that portions of public ground should be taken for such things, and money paid for good positions to enjoy them, inasmuch as without these payments the enterprises could not be maintained, and the enjoyment derived by the public from the land dedicated to their recreation would be less and not greater. By the evidence of Webster it appears that the inhabitants of Sydney are not behind the rest of the world in their readiness to see sights and to pay for them. Their Lordships think it impossible to say that the lands are not being used and enjoyed with due regard for the rights and interests of the public.

The result is that in their Lordships' judgment the Court below ought to have dismissed the whole suit with costs. They will now humbly advise Her Majesty to discharge the decree appealed from except so far as it dismisses the claim with costs, and to dismiss the information with costs. The respondents must pay the costs of this appeal.