[HIGH COURT OF AUSTRALIA.]

GOLDSBROUGH, MORT & COMPANY, LIMITED . . . . . } APPELLANTS;

AND

LARCOMBE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 25, 26, 27.

Griffith C.J., Barton and Isaacs JJ.

Pastures Protection Act 1902 (*N.S.W.*), (*No.* 111 *of* 1902), *sec.* 42—*Rabbit-proof fence on boundary of holding—Right of owner to contribution—Liability of adjoining owner—Time when liability arises—Effect of notice of demand—Construction of Statutes—Repeal and re-enactment with modifications.*

Sec. 42 of the *Pastures Protection Act* 1902 (N.S.W.) provides that the owner or occupier of a holding who erects rabbit-proof fencing on the boundary of his holding, or makes an existing fence rabbit-proof, may recover from the owner of adjoining land a contribution towards the cost of the work, "subject to the provisions of this section." The section then provides that no contribution shall be payable unless the fence has been erected or made rabbit-proof *bonâ fide* for the purpose of protection against rabbits and the owner who is called upon for contribution derives a benefit from the fence, and, further, that the right to contribution shall vest and the liability to pay it shall arise "when the then occupier or owner of the holding gives to the then owner of the land outside the holding the prescribed notice of demand," and from that time so much of the contribution as remains unpaid shall be a charge upon the land. It is immaterial whether the fencing was done before or after the commencement of the Act.

Held, that the right to contribution and the liability to pay it are not limited respectively to the owner who has actually incurred the expense of fencing and the person who was the owner of the adjoining land when the expense was incurred, but extend to subsequent owners, and, therefore, the owner for the time being of the holding in respect of which the expense was originally incurred is entitled, upon giving due notice of demand, to contribution from the holder for the time being of the adjoining land.

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Where a provision in a Statute has been judicially interpreted, and the legislature subsequently, in a consolidating Statute, repeals that provision and substitutes for it a provision in substantially different language, it is to be presumed, *primâ facie*, that they intended to alter the law as declared by the previous decisions.

Decision of the Supreme Court: *Larcombe* v. *Goldsbrough, Mort & Co.*, (1907) 7 S.R. (N.S.W.), 123, reversed.

APPEAL from a decision of the Supreme Court on a special case stated by the Land Appeal Court.

This was a claim by the appellants under sec. 42 of the *Pastures Protection Act* 1902 before a local Land Board, for contribution by the respondent towards the cost of erecting a rabbit-proof fence on portion of the common boundary between their holdings. The holding of the respondent consisted of portions 102 and 95, but at the date of the erection of the fence in 1901 he was the owner of portion 95 only and had acquired portion 102 subsequently. Notice of demand was served by the appellants upon the respondent in August 1905, claiming a contribution in respect of the whole fence, including that bounding portion 102 as well as that bounding portion 95. The Land Board allowed the claim, and their decision was affirmed by the Land Appeal Court. A special case was then stated by the Land Appeal Court, the following questions being submitted for the opinion of the Full Court:—(*a*) Do the words "the then occupier or owner" and "the then owner" in the third paragraph of sec. 42 of the *Pastures Protection Act* 1902 (No. 111) mean the occupier or owner respectively at the date of notice of demand or such owner or occupier at the date of erection of the fence; (*b*) whether, the boundary fence between the land of the appellants and portion 102 having been made rabbit-proof when the respondent was not the owner, the claim for contribution in respect of that portion of the fence can be maintained against the respondent; (*c*) whether on the expiry of the annual lease of portion 102 held by the respondent's predecessor in title the half of the rabbit-proof fencing became the property of the Crown, so as to disentitle the appellants from bringing a claim in respect of it; and a fourth question which is not material to this appeal.

The Full Court answered these questions in favour of the

respondent: *Larcombe* v. *Goldsbrough, Mort & Co.* (1), and from that decision the present appeal was brought by special leave.

The material sections are set out in the judgments hereunder.

Windeyer (*Whitfeld* with him), for the appellants. The whole question turns on the word "then" in the third paragraph of sec. 42. The only reasonable construction is to make it relate to the giving of notice. That is the point at which the Act fixes the liability and the right to contribution. The person who is owner when the notice is given may claim contribution from the person who is holder of the adjoining land at that time. Reference to the previous provision, for which this has been substituted, and to the decisions upon it, makes the matter still clearer. [He referred to *Booth* v. *Bryce* (2); *Hill, Clark & Co.* v. *Dalgety & Co.* (3); *Goldsbrough, Mort & Co.* v. *Gow* (4).] The result of those cases was to establish the law under the *Rabbit Act* 1890, sec. 20 on the basis that the owner who actually erected the fence was the only person who could claim contribution, and the only person liable to contribute was the person who was the holder of the adjoining land at the date of the erection. The present section, which takes the place of sec. 20 of the *Rabbit Act*, contains the word "then" before owner in each instance, and it must be presumed that the legislature in so altering the language had in view the decisions on the construction of the original section, and intended to make a change in the law. This view is further strengthened by the middle part of the section, the proviso that there shall be no contribution unless the person from whom it is claimed derives benefit from the fence. It is possible that the adjoining holder might derive no benefit at the time of erection, but his successors in title may, and yet, on the respondent's construction, they would not be liable to pay for the benefit. [He referred also to section 43, as to annual contributions.]

Piddington (*Waddell* with him), for the respondent. Paragraph 1 of sec. 42 is the guiding portion of the enactment as to

(1) (1907) 7 S.R. (N.S.W.), 123.
(2) 13 N.S.W. W.N., 98.
(3) 15 N.S.W. W.N., 50.
(4) (1901) 1 S.R. (N.S.W.), 36.

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the class of persons to pay and to be paid. It is the person who has incurred the expense who may make the claim, and the time within which the right can vest is limited to his tenure: *Mortimore* v. *Mortimore* (1); *Mortimer* v. *Slater* (2). This provision has reference only to personal rights and liabilities, and the corresponding provision in sec. 20 of the *Rabbit Act* is practically identical. The legislature must be presumed to have adopted the construction put upon that provision by the Courts: *Saunders* v. *Borthistle* (3). "Then owner" refers back to the time when the right to claim a contribution arises, that is to say, when the owner has erected a fence that is rabbit-proof and of benefit to the adjoining holder. The word "then" has been inserted for the purpose of pointing to the original owner as the person entitled, and the person who was "then" the holder of the adjoining land as the person liable to pay. Without that word the third paragraph would be possibly open to the construction contended for by the appellants. The vesting of the right and the arising of the liability are postponed until the notice of demand has been made, but the persons who may acquire the right or be made liable have been ascertained by the first paragraph. The third paragraph limits the right of the owner who has incurred the expense to enforce his claim by prescribing a notice of demand. The period of vesting is important for the purpose of sec. 43, which makes the contribution a charge upon the land. The proviso as to *bona fides* &c. was inserted to meet the case of *Goldsbrough, Mort & Co.* v. *Gow* (4). If the legislature had intended to impose upon subsequent adjoining holders the liability to contribute, they could have made it clear by using the words "or his transferee." The only transfer of liability that has been provided for is that incident to making the contribution a charge upon the land. [He referred to secs. 43, 48 (2) (*e*), and Form 25 of notice of demand, under Regulation 46; *Hill, Clark & Co.* v. *Dalgety & Co.* (5).]

Nov. 27th, 1907.

GRIFFITH C.J. This is an appeal from a judgment of the Supreme Court allowing an appeal from the Land Appeal Court

(1) 4 App. Cas., 448.
(2) 7 Ch. D., 322, at p. 330.
(3) 1 C.L.R., 379.
(4) (1901) 1 S.R. (N.S.W.), 36.
(5) 15 N.S.W. W.N., 50.

on a case arising under the *Pastures Protection Act* 1902. The appellants and the respondent were owners of adjoining tracts of land. In 1901 the appellants, at their own expense, made an existing boundary fence between the two pieces of land rabbit-proof. At that time respondent was the owner in fee of a portion of the land of which he is now the owner, and he became the owner of the remainder by a special lease granted in 1904.

The appellants claim that under these circumstances they are entitled to obtain from him contribution in respect of the whole cost of the boundary fence. And so the Land Appeal Court thought. The Supreme Court held that they were not entitled to recover on the ground that the only person from whom contribution could be claimed was the person who was owner when the fence was made rabbit-proof.

The question arises under sec. 42 of the *Pastures Protection Act* 1902, which is a re-enactment of an Act passed earlier in the same year and called the *Rabbit Act* 1901. Sec. 42 provides:—

"Where the boundary, or any part thereof, of any holding is fenced with a rabbit-proof fence, or a fence of such boundary, or part thereof, has been made rabbit-proof at the expense of the occupier or owner of such holding, or of the occupier or the owner of any land included in the holding, a contribution towards the cost of the work shall, subject to the provisions of this section, be payable by the owner of any land outside the holding and adjoining the rabbit-proof fence to the occupier or owner who has incurred such expense:

"Provided that a contribution shall not be payable where the local Land Board is of opinion that the rabbit-proof fence has been erected, or the fence has been made rabbit-proof, otherwise than *bonâ fide* for the purpose of excluding or destroying rabbits, or unless or until in the opinion of the said Board the land from the owner whereof the contribution is demanded derives a benefit therefrom:

"The right to receive such contribution shall vest, and the liability to pay the same shall arise, when the then occupier or owner of the holding gives to the then owner of the land outside the holding the prescribed notice of demand; and from and after the date when such notice is given, the amount of the contribution,

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or so much thereof as may for the time being be unpaid, shall, until payment, be and remain a charge upon the land in respect of which such contribution is payable."

Then follow some provisions to which it is not necessary to refer, except the last, which reads:—"It shall be immaterial whether the rabbit-proof fence was erected or the fence was made rabbit-proof before or after the commencement of the Act."

That last provision is very important, because it shows that the intention of the legislature was to give the right of contribution in respect of all rabbit-proof fencing, whether already existing or afterwards to be erected. It was to create a new right of recourse to the adjoining owner, no matter how old the fence might be, provided it was an effective fence. That is very important in consideration of the view taken by the learned Judges of the Supreme Court, who thought that the notice could only be given to the person who was the owner of the adjoining land when the fence was erected.

I will point out the extraordinary result that would follow. The owner of land who has erected a rabbit-proof fence before the passing of the Act, no matter how long before, is entitled to contribution. But according to the decision given, he cannot get that contribution until he has given notice to the owner of the adjoining land. In the meantime the land may have passed to a succession of owners, and he has to give notice to some person who has no longer any interest in the land, whom he may not be able to find, and a judgment against whom, if found, will bind his successor in title to the land. That is an extraordinary result.

For the appellants it is contended that the right of obligation to contribute is imposed on the person called the "then owner." Sec. 42 says "the right to receive such contribution shall vest, and the liability to pay the same shall arise, when the then occupier or owner of the holding gives to the then owner of the land outside the holding the prescribed notice of demand." It is said that that points clearly to the existing state of things. The person who for the time being is owner of the holding is to give notice to the person who is for the time being the owner of the adjoining land. That is the *primâ facie* meaning of the language of the section. The word "then" refers to some time.

The only time to which it can refer grammatically is to that of the verb "gives."

In my opinion the words of the section *primâ facie* mean that the owner for the time being may give the notice to the owner for the time being of the adjoining land. It is said that, although that may be the *primâ facie* meaning, it is not the true meaning, and that the context controls it.

There had been an earlier Act, the *Rabbit Act* 1890, by which also a right to contribution was given. Sec. 20 of that Act provided: —"When the boundaries of any holding or any portion of such boundaries shall have been made rabbit-proof, the owner of such holding shall be entitled to serve notice of demand and thereafter to enforce from the owner of any outside holding or lands (whether public or private) adjoining the rabbit-proof fence a contribution of one-half of the cost of making such boundaries rabbit-proof, and an annual contribution of one-half the cost of the maintenance and repair of the rabbit-proof fence, subject to the following provisions."

That also was intended to apply to fences erected before the passing of that Act, but the Supreme Court held in 1898 that that right could only be enforced against the person who was the owner of the adjoining land at the time when the fence was erected. It is unnecessary to consider whether that decision was correct or not, because in 1902 the legislature passed the section in the form now appearing.

It is contended that what the legislature intended was a mere re-enactment of the original Act. The *primâ facie* inference, however, is that they intended to change the then existing law. I have pointed out that the words "then owner," used twice in sec. 42, apparently mean the owner for the time being. I find two provisions which strongly confirm that view. The first paragraph of the section provides that a case for contribution has been made when a fence, or part of it, has been made rabbit-proof, at the expense of the occupier or owner, a contribution towards the cost shall be payable by the owner of any land outside the holding and adjoining the fence to the person who gives notice as owner of the holding. It follows, therefore, that, in the event of a present holding comprising land which previously formed two

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or more holdings, the present holder may claim contribution in respect of the fencing erected by one of the previous separate owners, which clearly suggests that notice need not be given by the person who puts up the fence.

I find, again, the proviso that the contribution is not payable until the owner of the land derives a benefit from it. It may be, therefore—as is quite apparent to anyone familiar with the conditions of the country—that rabbit-proof fencing has not been of any value to the owners of the adjoining land for many years after erection, but as soon as it becomes of value, then the person who erected the fence can claim contribution.

The proviso also certainly suggests that the time referred to is not the time when the fence was erected, but the time when the owner becomes entitled to the benefit of the Act, which is not until he gives notice to the then owner of the adjoining land.

The only words which can be suggested to indicate a different meaning are, that the contribution shall be payable "to the occupier or owner who has incurred such expense." That, it is said, shows that the only person who can claim is the person who spends the money in putting up the fence; but that is not consistent with the first part of the same sentence, which authorizes the owner of the holding to claim contribution in respect of a fence erected by the previous owner of part of it.

It may be that the present owner is to be regarded as a duly constituted agent of the previous owner to sue for that contribution, or the legislature may have taken the eminently commonsense view that, when a man has put up a rabbit-proof fence and afterwards sells the land, the person who purchased his land has in all probability paid for that fence, and is entitled to all the benefits arising from the ownership of it.

Such a construction gives a full and literal meaning to all parts of the section, with the exception of the few words, the "owner who has incurred such expense," &c.

For these reasons I am of opinion that the decision of the Land Appeal Court was right, and that the section must be read in its literal meaning, as giving the right to the present appellants to proceed against the present respondent for a contribution.

BARTON J. There are two portions in question, 95 and 102. Liability as to portion 95 is apparently admitted, and it seems to be also admitted that, with regard to both portions, it was the appellants, who, acting as owners, incurred the expense of making a boundary fence rabbit-proof.

The sections now in question are purely consolidating sections taken from the *Rabbit Act* 1901 and passed in 1902. The claim is one for contribution for making rabbit-proof a fence situated on the common boundary of lands occupied by the claimant and appellant company, and that occupied by the respondent Larcombe, and the main contest in the case is as to the meaning of the words "the then occupier and owner of the holding" and "the then owner of the land outside the holding."

In the judgment of the Supreme Court the Chief Justice of New South Wales said (1):—"Now, the then occupier or owner who is to give the notice is the occupier or owner who has incurred the expense; it is he and he only who can claim contribution. The first adverb 'then' clearly refers to the occupier or owner who was the occupier or owner when the fence was made rabbit-proof; . . . the second adverb 'then' has reference to the same time, and not, as has been contended, to the time when the notice of demand is given." If His Honor's opinion there stated is correct, of course that ends the case. But I have not been able to persuade myself that His Honor has correctly interpreted the section in the passage quoted. First let us read the last portion of the section by itself. "The right to receive such contribution shall vest, and the liability to pay the same shall arise, when the then occupier or owner of the holding gives to the then owner of the land outside the holding the prescribed notice of demand." So that it is the giving of the notice of demand which invests the claimant with the right to receive contribution, and imposes immediate liability to pay upon the adjoining owner. The then occupier or owner of the land, and the then owner of the land outside seem to me to be terms which require no explanation whatever as they stand. The time when the right of contribution vests and the liability arises is when the then occupier or owner gives to the then occupier or

(1) (1907) 7 S.R. (N.S.W.), 123, at p. 125.

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owner notice of demand. It seems to be a proposition for which it is difficult to find any plainer equivalent.

Primarily the words "then occupier or owner of the holding" plainly mean the existing occupier or owner of the holding, and the words "then owner of the land" mean the existing owner of the land outside. It is the meaning that persons in ordinary conversation would adopt, and unless there is something in the Statute to the contrary, it must control the Court.

As regards the judgment of the Full Court arising upon portion of the same section—the last part of the first paragraph—if that portion of the section were read in the way I am going to read it now, leaving out some of the words, it might be strongly contended that there was a context controlling the third paragraph, and affixing to it the meaning that the Full Court gave it. If it read:—"A contribution towards the cost of the work shall be payable by the owner of any land outside the holding and adjoining the rabbit-proof fence to the occupier or owner who has incurred such expense"—if, I say, that were the context, it might control the meaning of the third paragraph and form such a context to the word "then," as to give it a meaning which does not primarily appear. But that is not the first paragraph. The concluding words of the paragraph are these:—"A contribution towards the cost of the work shall, *subject to the provisions of this section*, be payable by the owner of any land outside the holding and adjoining the rabbit-proof fence to the occupier or owner who has incurred such expense." And it seems to me that by the insertion of the words "subject to the provisions of this section" the primary meaning of the words in the first paragraph, which might otherwise have been different, is subjected or controlled by the rest or the later part. Not to read the first paragraph in that manner is to deny the force and effect of the words "subject to the provisions of this section," which words subordinate that part of the section to the remainder of it.

It seems to me, therefore, that by the insertion of the words I have read—which do not appear to have impressed themselves upon their Honors—the legislature has intended to give a controlling force to the remaining provisions, so far as they are plain. And this provision in the third paragraph is, on its face, one that

requires no definition. The right to receive vests, and the liability to pay arises, when the occupier for the time being gives the prescribed notice of demand to the person who owns the outside land at that time. I do not think that, in putting the words in this way, I have made them one jot clearer than they are in the section itself.

If there were any doubt as to the meaning of the section standing alone, that doubt is removed by the prior legislation of 1890, and the cases decided under it.

The *Rabbit Act* 1890, sec. 20, provided:—"When the boundaries of any holding or any portion of such boundaries shall have been made rabbit-proof, the owner of such holding shall be entitled to serve notice of demand and thereafter to enforce from the owner of any outside holding or lands (whether public or private) adjoining the rabbit-proof fence a contribution of one-half the cost of making such boundaries rabbit-proof, and an annual contribution of one-half the cost of the maintenance and repair of the rabbit-proof fence, subject to the following provisions:"

The 21st section provided:—"The provisions of the last preceding section shall extend and apply to rabbit-proof fences erected, and to fences made rabbit-proof, before the passing of this Act."

Now there are certain decisions under that Act, among them *Booth* v. *Bryce* (1); *Hill, Clark & Co.* v. *Dalgety & Co.* (2); and *Goldsbrough, Mort & Co.* v. *Gow* (3). The latter, I think, is not so important as the two earlier cases. Those decisions demonstrate that it was the opinion of the Full Court that under sec. 20 the word "owner" did not mean owner from time to time of the land, but the owner who had erected the fence or made it rabbit-proof. Whether sec. 20 really bears that meaning, or whether the word "owner" used in that section means "owner from time to time," it is not necessary now to inquire. It is enough to say that the decisions serve to show that their Honors put the interpretation I have mentioned on the express words of the *Rabbit Act* 1890, and therefore held that the word "owner"

(1) 13 N.S.W. W.N., 98. (2) 15 N.S.W. W.N., 50.
(3) (1901) 1 S.R. (N.S.W.), 36.

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was not the owner from time to time, in the signification I have attached to the words "then owner," in respect of the Act of 1902.

But what is important is that these decisions afford an aid to the construction of the Act of 1902. A judicial interpretation was placed upon portion of the *Rabbit Act* 1890, corresponding with that which we are now dealing with. The legislature, if they had found words judicially construed according to their own meaning and intention, might have been expected to leave these words as they stood. But the fact that they have altered the words substantially of course puts the duty upon the interpreter of the Statute to see whether the legislature has not altered the language in order to remove any doubt as to its meaning caused by intervening decisions. And I think that is what the legislature has done in this Act.

I mention at this stage that the sections which are of any importance are secs. 43 and 70 of the *Rabbit Act* 1901, passed in 1902, and then secs. 33, 34 and 62 respectively. It was in the *Rabbit Act* passed eleven years or so after the Act which has been judicially interpreted that these sections first occurred, and they are now transferred to the *Pastures Protection Act* 1902.

I have read the material portions of the 20th section of the *Rabbit Act* 1890, and it does appear that it was then doubtful whether or not the word "owner" bore the interpretation that the Court affixed to it. There was room for doubt whether the word in the Act of 1890 was not open to two constructions. Parliament has, to my mind, put a definite interpretation upon its meaning by the expression used in the *Rabbit Act* 1901, and copied into the Act of 1902. And so, if there were any doubt as to the meaning of the contested expressions in the Act of 1902, that doubt would be removed by contrasting them with the phrases of the Act of 1890; and, for the purpose of such contrast, it is enough to show that in the Act of 1890 there was an ambiguity as to the meaning of the word "owner." Then we turn, in the light of the intervening decisions, to the Act of 1902, and see the word "owner" qualified with another expression evidently intended to make clear the meaning of the words "occupier or owner of such holding" and "owner" of the holding

to be assessed. And when the word "then" is used in connection with the endeavour, it seems to me to be a clear endeavour to give a definite meaning to those two expressions for the purpose of removing doubts which might have arisen under previous legislation. Then the construction, that I have ventured to say is to be put upon the 42nd section, is fortified by the change made when Parliament had before it previous legislation, and the interpretation that had been given it, and Parliament must be assumed to have duly reconsidered its earlier work with the view of making its intention clearer, and not of leaving things as they were.

If the ordinary meaning of these words is just what they say, and they cannot be controlled except by some such context as has been pointed out in the first paragraph, then, unless they are so controlled, the case for the appellants becomes amply clear. I am of opinion that the words "subject to the provisions of this section," in the first paragraph, were devised for the very purpose of preventing that which had been held to be a controlling phrase from being any longer a controlling phrase, and, indeed, of subordinating it to what follows; and therefore that the words in the last paragraph must be taken to mean what they say and to govern the section.

There are other expressions in the 42nd section which strengthen the construction this Court is placing on the words. I need not refer to them. I rest my opinion upon the considerations I have already laid down, which seem to me to be sufficient. I would add just one thing. The 70th section of the *Pastures Protection Act* 1902 provides:—"Whenever by this Part, any sum of money is expressed to be charged upon any private land, any person thereafter becoming the owner of such land shall be taken to have notice of such charge, and shall be liable to pay the sum so charged or so much thereof as may for the time being remain unpaid as if he were the person originally liable; but nothing herein contained shall operate to discharge the liability of any person originally or previously liable. Provided always such charge shall be entered in the rate-book as against such land at the date of transfer, and it shall be the duty of the board when and so often as any land within the district becomes charge-

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able with any sum under this Part to have an entry of the same made as aforesaid." That is a section copied from the 62nd section of the *Rabbit Act* 1902. It has been suggested that it refers only to rates, because the proviso declares that any charge upon the land shall be entered in the rate book. I cannot find that it requires any such interpretation. The section occurs in the same Part of the Act as sec. 42 and the connected sections.

There is thus imposed in connection with the charge, which the contribution forms upon the land of the outside holder, a distinct personal liability, and it would be impossible to contend that the owner of the land under that section does not mean the owner from time to time. That being so, it seems perfectly clear that there is running with the land a charge, and concurrently with that charge there is a liability.

I am therefore of opinion that the appeal should be allowed.

ISAACS J. read the following judgment. It is unnecessary to consider whether previous decisions under prior legislation were well founded or not, but I should like to state formally, as I indicated during the argument, what seems to me to be the connected and well settled plan devised by the legislature in secs. 42 and 43 of the Act.

Sec. 42 begins by providing that, where the owner (for brevity I leave out the occupier) of land provides a boundary rabbit-proof fence, a contribution towards the cost of the work shall "subject to the provisions of this section" be payable by the adjoining owner to the owner who incurred the expense. The respondent contends, and the Supreme Court has held, that the legislature means throughout the whole section to confine the right to receive the contribution, on the one hand, and the liability to pay it, on the other, to the two individuals who happen to be the fencing owner and the adjoining owner at the time the work is done. But that is not, in my opinion, the meaning of the section. The words "subject to the provisions of this section" are equivalent to saying "except as modified or otherwise provided by this section," and when the whole section is examined, it is found that the legislature has not only prescribed general conditions of liability for every case, but has also otherwise provided

most carefully for what must be expected sometimes to happen, namely, transmission or transfer of ownership both of the fencing owner's land, and the adjoining owner's land, between the time when the fence, or portion of the fence as the case may be, is completed and the time when the demand is or can be lawfully and effectually made. The second paragraph of the first sub-section of sec. 42 insists on *bona fides*, and further enacts that no contribution shall be payable "unless or until in the opinion of the said board the land from the owner whereof the contribution is demanded derives a benefit therefrom." I may with advantage here read in connection with this provision the enactment later on in the section that the amount of contribution is not to exceed half the value at the date of the demand. Now the words "the land from the owner whereof the contribution is demanded" show clearly, to my mind, that the person from whom the demand is to be made must at the time of the demand be the owner of the adjoining land; the word "derives" shows that the benefit spoken of must be a present one, otherwise the demand is futile; and the later words quoted are decisive that the owner is not to be bound to pay for anything more than his share of the value of the fence at the moment of the demand. So far there is, at least, a strong implication that the operation of the section is not to be confined to the original parties.

But there are other words which make it absolutely necessary to imply the more extended meaning. Recollecting that what I may call the primary right to receive and the primary duty to pay in the first paragraph were made "subject to the provisions of this section," the third paragraph goes on to provide in whom and when the right to receive and the correlative duty to pay the contribution shall arise.

The words are "The right to receive such contribution shall vest"—the word "vest" is sufficient to confer the right—"and the liability to pay the same shall arise"—words equally potent to impose the obligation to pay—"when"—that is at the moment when—"the then occupier or owner of the holding gives to the then owner of the land outside the holding the prescribed notice of demand." Parliament has here marked out a specific moment of time, namely, the delivery of the demand; it has also marked

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out specific individuals, namely, the then owners—the word "then" being referable only to the point of time just previously specified—and it has declared that at that moment, on the one hand, the right to receive shall vest—obviously for the benefit of the person making the demand, because it meant the demand to be complied with, and that could only be by paying the person making it—and on the other hand, the liability to pay shall arise just as obviously by the person of whom payment is demanded —supposing, of course, all other conditions of the section are satisfied.

This personal liability is followed up with the compelling consequence that, until payment, the amount of the contribution shall be a charge on the land, and that must, on all ordinary principles, be the land of the person on whom the demand is made, and who is bound to pay.

It is quite inconceivable to me that Parliament could have intended a personal demand, made on A. for his own liability, should have for its consequence a charge, not on any land of A. however much he might have, but on the land of B. however little he might possess, and yet this would be the inevitable result if the view taken by the Supreme Court were upheld. The matter does not stop even there. A fence when erected and paid for must be maintained and repaired, and by sec. 43 the fencing owner and the adjoining owner have to share the expense, the adjoining owner being bound to make an annual contribution for this purpose.

The second paragraph of sec. 43 follows exactly the same scheme as sec. 42. The right to receive a contribution and the duty to maintain and repair run with the fencing owner's land; while the liability to pay the annual contribution is stated to "run with the land whereof the owner was liable to pay the aforesaid contribution towards the cost of the fence." The words "liable to pay," like the phrase "right to receive," correspond with the phraseology of the third paragraph of sec. 42, and they refer to the obligation after demand, that is the obligation of the "then owner" immediately on demand. Looked at, therefore, either from the standpoint of literal construction or of the reasonable working of the Act, I see no way of supporting

the view taken by the learned Judges of the Supreme Court of New South Wales, and therefore concur in thinking the appeal must be allowed. It may not be out of place to draw attention to what appears to be a slip in sec. 70 of the Act in the use of the word "Part." The wording of the proviso to the section indicates it was intended to apply to such a case as occurs in sec. 23, but the limitation of the section by the word "Part" excludes that application.

Appeal allowed and order appealed from discharged. Questions answered: (*a*) *At the date of notice*; (*b*) *Yes*; (*c*) *Not so as to disentitle respondent to pay costs of the Supreme Court and of this appeal. Case remitted to the Land Appeal Court.*

Solicitor, for the appellants, *W. A. Windeyer*, for *Alexander & Windeyer.*

Solicitors, for the respondent, *Ellis & Batton.*

C. A. W.