[HIGH COURT OF AUSTRALIA.]

WILLIAMS AND ANOTHER . . . APPELLANTS;

AND

THE MARSH ESTATES LIMITED . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 1.

Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

Fence—Rabbit-proof fence—Contribution towards cost—Recovery by "occupier or owner"—Sale of land—Possession taken by purchaser—Demand by vendor before transfer—Pastures Protection Act 1912 (*N.S.W.*) (*No.* 35 *of* 1912), *secs.* 4, 49.

Sec. 49 of the *Pastures Protection Act* 1912 (N.S.W.) provides that (1) "where a boundary, or any part thereof, of any holding, is fenced with a rabbit-proof fence, . . . a contribution towards the cost of the work shall" (subject to certain conditions) "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"; (2) "the right to receive a contribution as aforesaid 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 after the date when such notice is given, the amount of the contribution . . . shall until payment be and remain a charge upon the land in respect of which such contribution is payable." By sec. 4 "owner" is defined as meaning, *inter alios*, (*b*) the holder of any purchase, whether conditional or otherwise, from the Crown, and (*c*) the person entitled at law to an estate of freehold in possession in any land granted by the Crown for other than public purposes. By the same section "occupier" is defined as meaning the person for the time being entitled to possession of a holding or land.

A was the owner of freehold and conditional purchase lands, on the boundary of which he had erected a rabbit-proof fence. He sold the land, including the improvements thereon, and the purchasers went into possession. Afterwards, but before transfers of the lands sold were executed, A, pursuant to

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sec. 49 of the *Pastures Protection Act* 1912, duly served upon B, who owned the adjoining land, a notice of a demand for contribution towards the cost of the rabbit-proof fence.

Held, that at the date when the notice was given, A was the "owner" of the lands within the meaning of sec. 49, and was therefore entitled to demand and receive the contribution from B.

Special leave to appeal from the decision of the Supreme Court of New South Wales: *Marsh Estates Ltd.* v. *Williams*, 15 S.R. (N.S.W.), 99, refused.

MOTION for special leave to appeal.

On the hearing of an appeal from the Land Board at Armidale, New South Wales, wherein the Marsh Estates Ltd. were the appellants and John Henry Williams and David Williams, junior, were respondents, the Land Appeal Court of New South Wales stated the following case for the decision of the Supreme Court:—

"1. On 2nd April 1913 the appellants were the registered proprietors for an estate in fee simple at law of certain freehold lands being Portion 17, and the registered holders in the books of the Lands Department of certain conditional purchase lands being Portions 12 and 84, all in the Parish of Williams, County of Hardinge.

"2. Prior to 2nd April 1913 the appellants had erected a rabbit-proof fence on the common boundary line of the said Portions 17, 12 and 84, and Portions 174 and 35, Parish of Williams, County of Hardinge.

"3. On 2nd April 1913 the appellants entered into a contract for the sale of the portions referred to in par. 1 to one Hamilton and one Mulligan.

"4. The said Hamilton and Mulligan entered into possession of the said portions on 2nd May 1913 under the said contracts, and the said purchasers duly fulfilled all conditions under the said contracts.

"5. On 15th May 1913 the appellants duly served on the respondents a notice of demand for contribution towards the cost of erection of the rabbit-proof fence referred to in par. 2, and on the said date the respondents were the owners of Portions 174 and 35, Parish of Williams, County of Hardinge.

"6. On 15th May 1913 the appellants were still the registered proprietors of Portion 17, and the registered holders of Portions

12 and 84, Parish of Williams, County of Hardinge, as set out in par. 1, but transfers of the said lands to the purchasers thereof were executed by the appellants on 4th September 1913.

"7. On 6th May 1914 the said claim for contribution became a matter for investigation before the Land Board at Armidale, when certain objections were raised on behalf of the respondents to the claim of the appellants, including an objection that at the time that the notice of demand was given the appellants were neither the owners nor occupiers of the land upon which the fence, the subject of the claim, was erected. After hearing evidence, the Land Board found that the appellants were not the owners at the date the notice of demand was given.

"8. At such hearing, Mr. H. M. F. Croft, the attorney of the Marsh Estates Ltd., under power of attorney, said in evidence:— 'When the land was sold there were various improvements in the way of buildings, ringing, suckering, &c. The improvements were all on the land at the time of signing the contract, and were included in the purchases. I would term a rabbit-proof fence an improvement. When I say the land was sold, it included all the improvements. There was no reservation *re* claim for fencing or anything else in the contract, or by announcement at sale.'

"9. On 22nd May 1914 a notice of appeal against the finding of the Land Board was lodged in the Land Appeal Court on the grounds:—

"(1) That the Marsh Estates Ltd. were the owners of the said portions of land numbered 17, 12 and 84, situated in the County of Hardinge, Parish of Williams, Land District of Armidale, on 15th May 1913 within the meaning of secs. 4 and 49 (1) of the *Pastures Protection Act* 1912.

"(2) That the decision was against evidence and the weight of evidence.

"10. On 22nd July 1914 the Land Appeal Court dismissed the said appeal.

"11. The appellants have duly requested the Land Appeal Court to submit a case for the decision of the Supreme Court upon the questions of law arising in the said appeal.

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"12. The questions for the decision of the Supreme Court are:—

"(*a*) Were the appellants on 15th May 1913 the owners of Portion 17, Parish of Williams, County of Hardinge, within the meaning of sec. 49 of the *Pastures Protection Act* 1912?

"(*b*) Were the appellants on 15th May 1913 the owners of Portions 12 and 84, Parish of Williams, County of Hardinge, within the meaning of sec. 49 of the *Pastures Protection Act* 1912?"

The Full Court answered both questions in the affirmative: *Marsh Estates Ltd.* v. *Williams* (1).

The respondents now moved for special leave to appeal to the High Court from that decision.

Mocatta (with him *C. E. Weigall*), in support of the motion, referred to *Goldsbrough, Mort & Co. Ltd.* v. *Larcombe* (2).

The judgment of the Court was delivered by

GRIFFITH C.J. Leave to appeal will be refused. There is no reason for doubting the correctness of the decision of the Supreme Court.

Special leave to appeal refused.

Solicitors, *Mackenzie & Biddulph*, Armidale, by *Mackenzie & Mackenzie.*

B. L.

(1) 15 S.R. (N.S.W.), 99.

(2) 5 C.L.R., 263.