

Backhouse v. Moderana (1) ; *Johansen v. City Mutual Life Assurance Society* (2) ; *Norton v. Taylor* (3)). There are special circumstances in this case justifying the grant of special leave. The defendant was entitled to appeal as of right (*Judiciary Act* 1903-1915, sec. 35). The slip or mistake of his solicitor in failing to give notice of appeal within the time prescribed by the *Rules of the High Court* 1911, Part II., Sec. III., r. 5 (1), should not deprive the defendant of an appeal. *Delph Singh v. Karbowsky* (4) is an authority for the grant of special leave in the present case. [He also referred to the *Rules of the High Court* 1911, Part I., Order LIII., r. 6.]

H. C. OF A.
1917.
~
RUSSELL
v.
RUSSELL.
—

ISAACS J. The majority of the Court think that the leave to appeal ought to be granted.

Special leave to appeal granted.

Solicitors for the applicant, *Durston & Ackland*.

- (1) 1 C.L.R., 675.
(2) 2 C.L.R., 186.
- (3) 2 C.L.R., 291.
(4) 18 C.L.R., 197.

[HIGH COURT OF AUSTRALIA.]

BROOKS APPELLANT ;
INFORMANT,

AND

KENNEDY RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Pastures Protection—Destruction of rabbits and noxious animals—Duty of owner when not occupier to destroy—Pastures Protection Act 1912 (N.S.W.) (No. 35 of 1912), secs. 4, 58, 59, 61-64.

H. C. OF A.
1917.
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SYDNEY,
Dec. 4.
—
Barton, Isaacs
and Rich JJ.

H. C. OF A.
1917.

~
BROOKS
v.
KENNEDY.
—

Sec. 58 of the *Pastures Protection Act* 1912 provides that "It shall be the duty of the owner or occupier respectively of any land from time to time to suppress and destroy, by all lawful means, at his own cost, and in accordance with the requirements of the" Pastures Protection "Board as specified under the provisions of sec. 61 of this Act all rabbits and noxious animals which may from time to time be upon such land, or upon any roads bounding or intersecting the same, or any part thereof. Any such owner or occupier who fails to fully and continuously perform such duty as aforesaid shall be liable to a penalty" &c. Sec. 61 provides that "A Board may, by notice in the *Gazette*, specify—(a) the date or dates . . . on or before which the owners or occupiers of all or any lands within the district shall respectively commence the work of suppressing and destroying rabbits and noxious animals on such lands, or upon any roads bounding or intersecting the same; and (b) the period or periods during which the said work shall be continued and systematically carried out; and (c) the means . . . which shall be adopted for carrying out the said work. Any such notice . . . shall also be published . . . in one or more newspapers published or circulating in such district. The Board may also give to the owner or occupier of any land within its district a peremptory notice in writing to take all proper steps in order to suppress and destroy rabbits and noxious animals on such land, and to adopt such means for the purpose as may be specified in the notice."

Held, that the duty created by sec. 58 is imposed on the owner of land whether he is or is not the occupier thereof.

Decision of the Supreme Court of New South Wales (*Ferguson J.*): *Brooks v. Kennedy*, 34 N.S.W.W.N., 200, reversed.

APPEAL from the Supreme Court of New South Wales.

At the Court of Petty Sessions at Scone an information was heard whereby Canute Brooks, a stock inspector, charged that Kenneth Kennedy, being the owner of certain lands within the Upper Hunter Pastures Protection District, did during the period between 5th March 1917 and 19th May 1917 "fail to fully and continuously perform the duty from time to time to suppress and destroy by all lawful means at his own cost in accordance with the requirements of the Upper Hunter Pastures Protection Board as specified under the provisions of sec. 61 of the *Pastures Protection Act* 1912 all rabbits and noxious animals from time to time upon the said lands or any part thereof." The Police Magistrate, having convicted the defendant, on the application of the defendant stated a case for the opinion of the Supreme Court. It appeared in the case that at the hearing it was admitted that the Board had, by

notice published in the *Government Gazette*, specified the matters referred to in sec. 61. The Police Magistrate stated that it was proved at the hearing, and that he found as a fact, that though the defendant was the owner he was not in occupation of the lands in question; and that he determined that, having failed to destroy rabbits on such lands during the period set forth in the information, the defendant was guilty as such owner of the offence described therein. The question for the opinion of the Supreme Court was whether the determination was erroneous in point of law.

H. C. OF A.
1917.

~
BROOKS
v.
KENNEDY.
—

The case was heard by *Ferguson J.*, who answered the question in the affirmative: *Brooks v. Kennedy* (1).

From that decision the informant now, by special leave, appealed to the High Court.

Knox K.C. (with him *E. W. Wickham*), for the appellant. The words "the owner or occupier respectively" in sec. 58 mean "the person being the owner or occupier who has been given notice to do the work of destroying rabbits and noxious animals." The meaning given to those words by *Ferguson J.*, namely, "the owner if he is the occupier or the occupier" makes the use of the word "owner" futile; for if the word "occupier" alone were used, it would, by reason of the definitions of "owner" and "occupier" in sec. 4, cover the case of an owner who was also an occupier. A notice having been given under sec. 61 specifying the date on or before which "the owners or occupiers" of all lands in the district shall "respectively" commence the work of destruction, then if the work is not done the Board may under sec. 58 proceed either against the owner, whether he is or is not in occupation, or against the occupier. That the intention was to make the owner responsible whether he is or is not in possession of the land is shown by the provision in sec. 63 making the expenses incurred by the Board in destroying rabbits and noxious animals a charge on the land. [Counsel referred to *Marshall v. Cox* (2); *Brooks v. Baker* (3); *Rabbit Act of 1890*, sec. 26; *Rabbit Act 1901*, sec. 40; *Pastures Protection Act 1902*, sec. 49; *Pastures Protection Amendment Act 1904*, sec. 2.]

(1) 34 N.S.W.W.N., 200.

(2) 27 V.L.R., 290; 23 A.L.T., 105.

(3) 31 N.S.W.W.N., 28.

H. C. OF A.

1917.

BROOKS

v.

KENNEDY.

Alec Thomson, for the respondent. By sec. 26 of the *Rabbit Act of 1890* the duty of destroying rabbits was cast upon "every owner and every occupier," making the liability joint and several. If the argument for the appellant is correct, then, although there has been a complete change of language, the duty imposed by sec. 58 of the *Pastures Protection Act 1912* is exactly the same as it was under sec. 26 of the *Rabbit Act of 1890*. The effect of that construction is to change the word "or" into "and." Even if that construction be correct, in order that an owner who is not also an occupier may have the duty cast upon him a notice must under sec. 61 be given to him calling upon him specifically as owner to destroy rabbits, &c. A notice addressed generally to "owners or occupiers" would be bad. The words "the owner or occupier respectively" in sec. 58 mean "the owner or occupier whichever of them is in possession at the time the notice under sec. 61 is given." The provision in sec. 62 as to the use of poison shows that the person on whom the duty of destruction is cast is the actual occupier. There is nothing in the Act which creates a primary liability in the owner.

BARTON J. This was a prosecution under the *Pastures Protection Act 1912* (No. 35 of 1912). It is impossible to read the relevant sections of the Act without seeing that the primary object of the Legislature is to ensure the clearing of land from rabbits and noxious animals, and that it is made the charge of the Pastures Protection Board to see that it is done. It is for them to get that duty performed, using such weapons as the Act allows, by the owner or by the occupier, but if it fails, then, as it is plain that outsiders cannot be called upon to do the work, the Board is itself to do it. The provisions of this particular part of the Act seem to be framed to that one end. In brief they are these:—By sec. 58 the duty is cast upon the "owner or occupier respectively" of any land to destroy these pests at his own cost and in accordance with the requirements of the Board as specified in sec. 61, and by sec. 59 an occupier as well as an owner is even given a power with the consent of the Board to raise fire on the land, for which otherwise he would be responsible, in order that he may be the better able to perform the duty which is cast

upon him. Under that section the defendant, who is the owner of the land in question, has been prosecuted and fined for non-performance of the duty thus cast upon him. Under sec. 61, to which reference is made in sec. 58, the Board may use two methods, whether alternative or cumulative it is not necessary now to determine. It may cause to be published in the *Gazette* and in a newspaper a notice specifying the date when the owners or occupiers of all or any lands within its district are to commence the work of destroying rabbits and noxious animals, and specifying also the period during which the work is to be continued and carried out, and the means to be adopted for doing it. This the Board has done. It may also give a "peremptory notice in writing" to "the owner or occupier of any land" to take all proper steps to destroy rabbits, &c. Then, by sec. 62, if the owner or occupier neglects or fails to comply with any notice, whether the *Gazette* notice or the peremptory written notice, he may be summoned to appear before the Board, and, unless he satisfactorily explains his failure or receives an extension of time to comply with the notice, any person authorized by the Board may enter on the land and use such means as may appear necessary or proper to be used to ensure the destruction of these pests on the land. Then there is a proviso that poison shall not be used unless notice has been given to the occupier of the intention to use it. That proviso is inserted in order that the person occupying the land or the owner, as the case may be, may see that stock may be removed from danger. Nothing in this section is to prejudice any proceedings under the Act for any penalty incurred by owner or occupier. Then comes an important section, sec. 63, which provides that, where the Board incurs expense under sec. 62 in carrying out the duty which the owner or occupier has neglected to perform, those expenses shall be repaid by the owner or occupier and until repaid shall be and remain a charge upon the land, and shall have priority over all mortgages and charges thereon.

That summary of the relevant sections brings it forcibly home that the object of the Act is primarily and essentially to see that the Board shall perform its duty of enforcing the clearing of land from these pests. It is contended that because of certain definitions

H. C. OF A.
1917.

BROOKS
v.
KENNEDY.
Barton J.

H. C. OF A.
1917.

~
BROOKS

v.

KENNEDY.

—
Barton J.

in the Act the owner is not liable unless he is also the occupier. *Ferguson J.* describes the contention in this way:—"The words of the section are: 'It shall be the duty of the owner or occupier respectively of any land. . . .' Mr. *Thomson*, on behalf of the appellant" (the present respondent), "contends that that means that it is the duty of the owner, if he is the occupier, and if not, it is the duty of the occupier." I agree with the argument of Mr. *Knox* that if that contention is right the use of the word "owner" in sec. 58 is futile. By sec. 4 the word "occupier" is defined as meaning "the person for the time being entitled to possession of a holding or land," and includes *inter alios* "the resident manager of the occupier where the occupier does not reside on the holding or land in relation to which the word is used." The word "owner" is defined in terms which include such holders as the present appellant. I see nothing in the two definitions to militate against the construction which arises out of the various sections of the Act, and that construction, it seems to me, is this: that all owners and occupiers of land in a particular district can be called upon to destroy rabbits, &c., but that the Board has an alternative or cumulative course of issuing a peremptory notice to the owner to perform that duty. If one looks at secs. 61 and 62 closely he sees that they strengthen the view that the Board can choose the person whom it intends to make responsible, because, if the owner or occupier fails or neglects to comply with the terms of the notice, the Board can enter upon the land and itself do the work of destruction, while under sec. 63 the owner or occupier is to repay the expense, or it is made a charge upon the land, that is, on the owner. It is immaterial to the Board which of the two persons, the owner or the occupier, it can induce to perform the duty, and if one of them has performed it the other cannot then in reason be called upon to perform it or be prosecuted for not having performed it. That shows conclusively that the intention is that the primary duty of the Board is to get the land cleared of rabbits, &c., that it has to carry out that duty by taking certain steps, and it seems to me that, having taken those steps, whether it considers that the real offender is the owner or that the real offender is the occupier, it can prosecute that particular person under sec. 58. The Board has prosecuted

the owner in this case and he has been fined, and in my view the appeal should be allowed and the conviction and fine should stand.

H. C. OF A.
1917.

BROOKS
v.

KENNEDY.

Isaacs J.

ISAACS J. I agree that the appeal should be allowed. For the purposes of this appeal the first section logically to be regarded is sec. 61. That section provides that the Board may by notice in the *Gazette* specify three things: first, a date or dates; secondly, a period or periods; and, thirdly, means. The dates that may be specified have reference to all or any lands which the Board may mention, but when the lands are pointed out to which the specified dates have operation, then the Act, by sec. 61, assumes that "the owners or occupiers" of all those lands shall "respectively," that is, in relation to their respective lands, commence the work of destroying rabbits and noxious animals on such lands, and not only on "such lands" but also, which is very important, upon any roads bounding or intersecting them, that is, public roads. The occupier has no more duty with respect to public roads than the owner, but it is necessary to include those roads because otherwise the work of clearing the lands of rabbits would not be effective. Those particulars having been satisfied—I disregard for the moment the alternative power to give a peremptory notice to the owner or occupier—I turn to sec. 58. That section assumes that the Board has given that notice, and says that there shall be a statutory duty on "the owner or occupier respectively"—those are the same words which are used in sec. 61—of any land from time to time to suppress and destroy, at his own cost and in accordance with the requirements of the Board as specified under the provisions of sec. 61, all rabbits and noxious animals which may from time to time be upon such land or upon any roads bounding or intersecting the same, and the section provides that that is to be done continuously. Sec. 62 provides for a penalty for neglect or failure to comply with the terms of the notice. Sec. 63 makes the expenses incurred by the Board in themselves doing the work a charge on the land. Sec. 64 enables five owners, with the Minister's sanction, to enforce the penalty upon one of their fellow owners who neglects or fails to destroy rabbits. That seems to point to this, that the one thing

H. C. OF A.
1917.
BROOKS
v.
KENNEDY.
Isaacs J.

about which the Act is solicitous is to see that the Board takes care to get the rabbits eradicated, and that it does not require the Board to select as between owner and occupier the person who is to eradicate them and bear the cost of doing so. For these reasons I think that the appeal should be allowed.

RICH J. I agree.

Appeal allowed. Order appealed from discharged. Question asked by the case answered in the negative. Respondent to pay costs of appeal.

Solicitor for the appellant, *G. M. Westgarth*, Scone, by *Garland, Seaborn & Abbott*.

Solicitor for the respondent, *J. A. K. Shaw*, Scone, by *Abbott, Tout & Balcome*.

B. L.

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| Foll Borchardt, H. 47 ACrimR 95 | Foll Will v Borchardt [1990] 2 QdR 399 | Appl Theologisid v Department of Community Services & Health (1991) 25 ALR 40 | Foll Pearson v Swannell (1920) 28 CLR 390 | Cons Faud Bin Mahboob v Minister for Immig & Ethnic Affairs (No2) (1996) 65 FCR 248 | Refd to Faud Bin Mahboob v Minister for Immigration & Ethnic Affairs (No2) (1996) 44 ALD 267 | Foll Lovering & Repatriation Commission, Re (1997) 48 ALD 375 | Foll Lovering & Repatriation Commission, Re (1997) 48 ALD 375 |
| Appl City of Mitcham v Heathhill Nominees (2000) 76 SASR 133 | Appl Brott v Joachim (2001) 27 FamLR 508 | Appl Brott v Joachim (2001) 161 FLR 234 | Foll Territory Insurance Office v Kouimanis Enterprises (2002) 12 NTLR 210 | HIGH COURT OF AUSTRALIA.] | | | |
| Appl Tourism Holdings v Comr of Taxes (2002) 166 FLR 368 | WORRALL AND ANOTHER | | | | | | APPELLANTS |
| APPLICANTS, | | | | | | | |
| AND | | | | | | | |
| THE COMMERCIAL BANKING COMPANY } OF SYDNEY LIMITED } | | | | | | | |
| RESPONDENTS. | | | | | | | |

H. C. OF A.
1917.
SYDNEY,
Dec. 3, 4.
Barton,
Isaacs and
Rich JJ.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Statute—Statutory rules—Interpretation—Retrospective operation—Prohibition of
appeal—War Precautions (Moratorium) Regulations (Statutory Rules 1916,
Nos. 284, 324; Statutory Rules 1917, Nos. 13, 76, 253), regs. 3, 4, 8c.
Reg. 8c of the War Precautions (Moratorium) Regulations (Statutory Rules
1917, No. 253),* which provides that “any determination decision judgment
direction order or assessment made or given by any Court in any matter