



[HIGH COURT OF AUSTRALIA.]

ALI GUNNEE KHAN . . . . . APPELLANT;  
 DEFENDANT,

AND

GEORGE FAWAZ . . . . . RESPONDENT.  
 COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF  
 VICTORIA.

*Fences—Duty of “occupier” of adjoining lands to contribute to fencing—Licensees of water frontages—Land alienated from the Crown—Fences Act 1915 (Vict.) (No. 2651), secs. 3, 5—Local Government Act 1915 (Vict.) (No. 2686), secs. 729, 733, 734, 737, 739.*

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MELBOURNE,  
 Oct. 20, 28.

Isaacs,  
 Gavan Duffy  
 and Rich JJ.

By sec. 3 of the *Fences Act* 1915 (Vict.) it is provided that, unless inconsistent with the context or subject matter, “occupier” includes “any person who is in the actual occupation of or entitled as owner to occupy any land alienated from the Crown by grant lease or licence; but does not include any person . . . in the occupation of land held by yearly licence under any Act relating to the sale and occupation of Crown lands heretofore or hereafter to be in force.” Sec. 5 provides that “the occupiers of adjoining lands not divided by a sufficient fence shall be liable to join in or contribute to the construction of a dividing fence between such lands in equal proportions.”

Part XXXIX. of the *Local Government Act* 1915 (Vict.) re-enacts the provisions of the *Unused Roads and Water Frontages Act* 1903 (Vict.)—sec. 729 defining “water frontage” as “any portion of Crown land not exceeding twenty chains in width which is not for the time being held under lease or licence . . . which has a frontage to the sea or any river creek lake or swamp,” and sec. 734 providing that “where private land abutting on a water frontage is not fenced off from such frontage it shall be the duty of the occupier of such private land to obtain a licence to occupy and use the whole of such frontage to the extent to which his land abuts thereon.”

*Held*, that the licensee of a water frontage is an “occupier” within the meaning of sec. 3 of the *Fences Act*, and, therefore, that the owners of the land on opposite sides of a creek who are the licensees of the water frontages upon which their lands respectively abut, those water frontages being separated by the creek only, are “occupiers of adjoining lands” within the meaning of



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1919. of a dividing fence between the water frontages.

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Decision of the Supreme Court of Victoria (Hood J.): *Fawaz v. Khan*, (1919)  
V.L.R., 132; 40 A.L.T., 146, affirmed.

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APPEAL from the Supreme Court of Victoria.

George Fawaz and Ali Gunnee Khan were the owners of land on the south and north sides respectively of the Glenmaggie Creek, which was not a permanent stream but occasionally became dry, and each of them was the licensee from the Crown of the water frontage between the boundary of his land and the creek. Each of the licences for the water frontages was granted under sec. 5 of the *Unused Roads and Water Frontages Act* 1903 (Vict.), and purported in consideration of an annual licence fee of ten shillings to grant to the licensee licence and liberty to occupy and use the land comprised in the water frontage subject to certain conditions, including the following:—“(3) The licensee shall not, except as hereinafter provided, cultivate or break the soil of any land held by him under the licence, nor shall he erect any building or construct any obstruction or sink or make any tank or dam thereon. (4) With the written consent of the Minister and the Council of the municipality within which the land is situated, and upon payment of such rate as may be fixed and specified by indorsement on the face of the licence, the licensee may break the soil of the licensed land to the extent mentioned in such indorsement. (6) That if the Minister so directs, the licensee shall at all times give free access to, and passage over, the land to persons desiring to obtain water for domestic purposes from any natural source of supply on the land, or on land contiguous thereto. (7) That with the written consent of the Minister any person shall have free access in and over the licensed land. (8) That the licensee shall not ring-bark, destroy, cut, or injure any live timber on the land unless with the consent of the Minister, upon the application of the municipal Council, or cut, destroy, or injure any vegetation growing along any stream preserving the banks from erosion. (9) That the licensee shall not cut, dig, or take away from the land any gravel, stone, limestone, salt, guano, shell, sand, loam, or brick-earth. (14) That the Governor in Council shall have power at any time, after giving to the licensee three months’ notice in



writing, to cancel the licence either as to the whole of the land or part." In each case the period of the licence had expired, but the licensee continued to occupy the water frontage and to pay the annual licence fee.

Fawaz, alleging that he and Ali Gunnee Khan were the occupiers of contiguous lands the common boundary of which was the Glenmaggie Creek, called in a Police Magistrate under sec. 6 of the *Fences Act* 1915 (Vict.) to fix a line of fence. On 18th December 1917 the Police Magistrate, by a document which recited that each party was the owner and occupier of certain specified land, that the lands were contiguous and that the Glenmaggie Creek formed the boundary thereof, purported to fix a line of fence partly along one side and partly along the other side of the creek. On 2nd November 1918 a notice was served by Fawaz upon Ali Gunnee Khan requiring him to join in or contribute to the construction of a dividing fence along the line so fixed; and, the latter having refused to agree to the construction of the fence, a complaint was laid by Fawaz under sec. 8 of the *Fences Act* 1915 against Ali Gunnee Khan. The complaint came on for hearing on 5th December 1918 before the Court of Petty Sessions at Heyfield, when an order was made that a fence of a certain description be erected along the line fixed by the Police Magistrate, the one half to be erected by the defendant and the other half by the complainant. The defendant obtained an order *nisi* to review that decision, which was discharged by Hood J.: *Fawaz v. Khan* (1).

From that decision the defendant now, by special leave, appealed to the High Court on the grounds (*inter alia*) that the defendant was not an "occupier" within the meaning of the *Fences Act* 1915; that the licensees of water frontages under secs. 727-744 of the *Local Government Act* 1915 (Vict.) are not owners or occupiers of lands alienated from the Crown; and that the complainant and the defendant were not owners or occupiers of adjoining lands within the meaning of the *Fences Act* 1915, there being a Government reserve on each side of the creek.

Owen Dixon, for the appellant. Land which is the subject of a licence under secs. 734 and 735 of the *Local Government Act* 1915 is not

(1) (1919) V.L.R., 132; 40 A.L.T., 146.

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H. C. OF A. 1919. *ALI GUNNEE KHAN v. FAWAZ.* “land alienated from the Crown . . . by licence” in the definition of “occupier” in sec. 3 of the *Fences Act* 1915. A “licence,” to satisfy that definition, must be one which gives some proprietary right in the land as against the Crown. A licence granted by a Minister under the sections of the *Local Government Act* is not an alienation from the Crown. Licences granted under secs. 47 and 54 of the *Land Act* 1901 are alienations from the Crown; it is licences of that kind which are referred to in the definition of “occupier.” Licences under sec. 145 of the *Land Act* 1901 are not within the definition.

*Hassett* (*Starke* with him), for the respondent. A person who occupies land pursuant to a licence under the sections of the *Local Government Act* 1915 dealing with water frontages is an “occupier” within the definition in sec. 3 of the *Fences Act*. That definition shows that a licence to occupy land for any term exceeding one year is sufficient to satisfy it. The term “alienation” means change of possession from one person to another (*Stroud's Judicial Dictionary*, 2nd ed., p. 65); under this licence the possession is put in the licensee, and he is given a right of occupation. [Counsel referred to *Hegarty v. Ellis* (1)].

[RICH J. referred to *In re Parry* (2).]

*Owen Dixon*, in reply. The term “alienated from the Crown” cannot be satisfied by the mere conferring of a right to enjoy possession of the land. Here no right is conferred upon the licensee except a permissive user for a certain time, and no demise of the land was created.

[RICH J. referred to *Glenwood Lumber Co. v. Phillips* (3); *O'Keefe v. Malone* (4).]

*Cur. adv. vult.*

Oct. 28.

The judgment of the COURT, which was read by ISAACS J., was as follows:—

Upon the facts found by the Magistrate the appellant and the respondent are the respective occupiers of contiguous lands, and

(1) 6 C.L.R., 264.

(2) 8 N.S.W.L.R., 242.

(3) (1904) A.C., 405, at p. 408.

(4) (1903) A.C., 365.



their lands abut on water frontages of the Glenmaggie Creek on the north and south sides respectively. The parties are also licensees, under sec. 737 of the *Local Government Act* 1915, of the water frontages on which they respectively abut, the appellant's licence being for three years and entitling him to exclusive occupation and use for that period, subject to certain contingencies which have not happened. An interest in the land is parted with by the Crown and given to the licensee.

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The question is whether the appellant is an occupier within the meaning of the definition of that term in sec. 3 of the *Fences Act* 1915. The answer depends on whether the land is "alienated" in the sense in which that expression is used in the statutory definition of "occupier." Alienation is an expression that is easily controllable by subject matter and context. In the definition under consideration, it is manifest that it is not confined to transfer of the fee mediately or immediately, because the excluding words are inconsistent with such a meaning. And similarly the clause excluding yearly licences under an Act relating to the sale or occupation of Crown lands shows that these would otherwise be included. If so, the water frontage licensed to the appellant would seem to come within the phrase "land alienated from the Crown by grant lease or licence."

It is said that sec. 733 of the *Local Government Act* is opposed to that view, and that in any case a possibly unfair burden is put on the licensee of a water frontage because he may have to pay and then be deprived of any benefit of his outlay. But we think that that section, which as to fences is of limited application only, cannot, nor can sec. 739, control the general question we have to determine.

The judgment appealed from is affirmed, and the appeal dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Fitzgerald & Fitzgerald*, for *Patten & Staveley*, Sale.

Solicitors for the respondent, *Weigall & Crowther*, for *Arthur F. Rice*, Maffra.

B. L.