

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeals of King
and Another v. Cheyne, from the Supreme Court
of the Colony of Victoria ; delivered 28th July
1900.*

Present at the Hearing :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD LINDLEY.

SIR RICHARD COUCH.

SIR HENRY STRONG.

[*Delivered by Lord Lindley.*]

The question raised by this Appeal is whether the Appellants are entitled to maintain unlocked swing rabbit proof gates across a public road.

The facts are as follows :—The Appellants are owners of land known as the Serpentine estate in the Shire of East Loddon in the Colony of Victoria. In 1896 the Appellants enclosed their lands with rabbit proof wire fencing at their own expense. They obtained the permission in writing of the Shire Council *i.e.* the Municipal Council of the Shire of East Loddon to erect wire netting swing gates across some public roads which intersected the enclosed land and they put up such gates accordingly. All this was done under the authority of Section 58 of the Vermin Destruction Act 1890 which will be referred to hereafter. None of the roads so interfered with are main roads; nor is the land enclosed part of any special area as defined by the Vermin Destruction Act 1890.

In 1898 the Respondent and other inhabitants of the district in which the enclosed land lay

applied for and obtained a rule nisi for a mandamus commanding the Shire Council to remove these gates on the ground that they were obstructions and illegal by virtue of Section 428 of the Local Government Act 1890. The order nisi was discharged by the Judge of First Instance Hood J. but on appeal to the Full Court his decision was reversed and the order was made absolute. From this decision the Appellants have obtained special leave to appeal to this Board. The Shire Council take no part in this Appeal. The Respondent has not lodged any case nor has he appeared by Counsel at their Lordships' Bar to oppose the Appeal. The only materials therefore before their Lordships are those furnished by the Appellants and the Colonial statutes. The Judgments of Hood J. and of the Court of Appeal are however before their Lordships.

The case really turns on three Colonial Acts of Parliament all passed on the same day. They are :—

1. The Local Government Act, 1890.
2. The Vermin Destruction Act, 1890.
3. The Fences Act, 1890.

They were all substantially re-enactments of previous Acts with amendments. By the Local Government Act, 1890 (No. 1112), Section 428, it is the duty of the council of every municipality, except as hereinafter or by any other Act of Parliament now or hereinafter to be in force provided, to open and keep open for public use and free from obstruction every surveyed and reserved road street or public highway required for public traffic and proclaimed by this or any other Act within the municipal district. Penalties are imposed on persons infringing this enactment. But there is a provision to the effect that unlocked swing gates not being injurious to the public may be put up across any road by the

adjoining owner with the licence of the Governor in Council on the application of the Municipal Council.

This is the enactment on which the Respondents relied and succeeded in their Appeal in the Colony. This Section 428 no doubt throws upon the Appellants the burden of showing that the swing gates which are in question have been lawfully erected and may be kept across public roads. But the exception at the beginning of the section is very material, especially having regard to the fact that the Legislature when they were passing the Local Government Act were actually passing another Act specially relating to the erection of rabbit proof gates across roads. Before noticing this Act it will be convenient to refer shortly to the Fences Act 1890.

By this Act (No. 1092) the occupiers of adjoining lands are required to separate them by a fence at their joint expense (Section 5); and to keep the same in repair (Section 16). Special provision is made for lands bounded by streams (Section 6); for lands bounded by other lands not occupied (Sections 10, 13); and for the erection if desired of live fences (*i.e.* hedges) next roads (Section 14). There is no other express provision relating to fences by the sides of roads. Nor is there anything in this Act which authorises the erection of any obstruction across a road. The Fences Act 1890 is only important for the better understanding of the Vermin Destruction Act 1890.

This Act (1153) is divided into two parts. The first part imposes the duty of destroying vermin including rabbits (Section 3) on the occupiers and owners of land (Section 7), and this duty extends to half of all roads bounding their lands (Section 14). The first part of the Act also contains elaborate provisions for en-

forcing the performance of this duty, *see* Part I., Sections 3-44. Then comes Part II. which contains a series of enactments to facilitate the erection of vermin proof fencing, *see* Sections 45-71. On a petition signed by the owner or owners of land desiring assistance, Shire Councils may obtain loans for enclosing lands with such fencing (Sections 45 *et seq*). Such lands form special areas (Section 46). If advantageous the lands of two adjoining owners may be enclosed with one vermin proof fence instead of being separated by a dividing fence, *see* Section 49 (6) and Section 57.

The provisions specially applicable to the erection of gates across roads are Sections 57, 58, and 59. These are as follows :—

“Section 57. Any two or more owners of adjoining properties, with the sanction of the Shire Council if within a special area, instead of having dividing fences between such lands may enclose the whole of such adjoining lands with a continuous wire netting or other rabbit-proof or vermin-proof fence having when enclosing any road swing gates covered with wire netting.”

“58. Any owner of land intersected with roads with the sanction of the Shire Council instead of having dividing fences between such land may enclose at his own expense the whole of such land with a continuous wire netting or other rabbit-proof or vermin-proof fence having when enclosing any road swing gates covered with wire netting. Nothing in this or the preceding or following section shall authorise the enclosing as therein provided of any main road.”

“59. In enclosing any two or more adjoining properties with one continuous fence under this part of this Act it shall be lawful, with the approval in writing of the Shire Council, to erect such fence across any public road if in the opinion of such Council such is not required for public use and if a swing gate with wire netting be erected wherever the fence crosses such road.

“If any person wilfully damages or destroys any such fence or swing gate erected across any such road or elsewhere or leaves any such swing gate open or breaks or injures any wire netting or other rabbit-proof or vermin-proof fence or portion thereof he shall on conviction be liable to be imprisoned for any period not exceeding six months and to pay a penalty not exceeding fifty pounds.”

The whole question before their Lordships really turns on the true construction of Section 58. Mr. Justice Hood thought that it plainly covered this case. But the Court of Appeal regarded Section 58 as confined to lands within special areas. This conclusion was arrived at by considering the position of Section 58 between Sections 57 and 59 which the Court read as confined to lands in special areas. The Court also thought that the words "instead of having dividing fences between such land" which occurs in Section 58 could have no meaning unless there was some duty to have such fences and this duty could only be found imposed on the owners of lands in special areas. The Court referred to Section 49 as imposing such duty on them. Their Lordships are unable to follow this reasoning.

The sections are not skilfully drawn. It does not appear to their Lordships that Section 57 is confined to adjoining lands in "special areas" although if they are in such areas the sanction of the Shire Council must be obtained not only because Section 57 says so, but also because of Section 59. The necessity for saying so in Section 57 may perhaps be accounted for by the fact that Section 57 relates not only to the crossing of roads but to the dispensation from the duty of having dividing fences as required by the Fencing Act 1890. Section 59 has no reference to this duty but is confined to putting gates across roads. The two sections are not co-extensive in their operation, but both may be read as applying to the owners of adjoining properties, whether within special areas or not.

The words in Section 58 "instead of having dividing fences between such land" are very

obscure. Between such land and what? The section does not say. If roads are meant then Section 49 imposes no duty to have any vermin proof dividing fences in special areas only. The dividing fences there spoken of are dividing fences between adjoining properties. Roads are not mentioned although perhaps they may be included. Dividing fences are required and are only required by the Fences Act 1899; but that Act applies to all lands and not only to lands in special areas. If dividing vermin proof fences are required in special areas it must be because the Shire Council find them necessary as a rule and require them accordingly. This they can do whenever their consent is necessary whether special areas are concerned or not.

Having carefully considered the various statutes and sections bearing on this question their Lordships have come to the conclusion that the construction put by the Full Court on Sections 57, 58, and 59 of the Vermin Construction Act 1890 is narrower than is required either by the language of those Sections or by the objects sought to be attained by them. It appears to their Lordships that notwithstanding Section 428 of the Local Government Act 1890 vermin proof swing gates can be lawfully put across roads other than main roads under the provisions of the Vermin Destruction Act 1890 by owners of lands whether adjoining owners or single owners with the consent of the Shire Council whether such lands are in special areas or not. Their Lordships think it as well to add that in their opinion the Act does not impliedly or otherwise authorise adjoining owners of lands out of special areas to put vermin proof swing gates across roads without the consent of the Shire Council.

Their Lordships will therefore humbly advise Her Majesty to allow this Appeal and to reverse the order appealed from. As regards the costs of the proceedings in the Colony the Appellants were not parties to them. The Respondent must pay the costs of this Appeal.
