For these reasons their Lordships humbly advised His Majesty that the appeal should be dismissed, and ordered the appellant to pay the costs of the appeal.

PRIVY COUNCIL. 1906.

PERRY v. CLISSOLD.

[HIGH COURT OF AUSTRALIA.]

THE BALMAIN NEW FERRY COMPANY LIMITED . . . . . DEFENDANTS, } APPELLANTS;

AND

ROBERTSON . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Oct.* 9, 10, 11. *Dec.* 18.

Griffith C.J., Barton and O'Connor, JJ.

Action for assault and false imprisonment—Passenger prevented from leaving ferry company's wharf without payment—Notice of conditions of contract of carriage—Leave and licence—Pleading—Amendment.

A ferry company placed over the entrance to their private wharf a notice stating that a fare of one penny must be paid by all persons entering or leaving the wharf, whether they had travelled by the company's boats or not. The plaintiff, who was aware of these conditions, paid the fare of one penny and was admitted to the wharf through a turnstile. Having missed his boat, he attempted to leave the wharf by another turnstile which was the only means of exit except by water. As he refused to pay a second penny the company's servants endeavoured to detain him, but he eventually succeeded in forcing his way through a small opening beside the turnstile. He brought an action against the company for assault and false imprisonment, and the defendants pleaded not guilty.

Held, that as the plaintiff could have left the wharf by water, there was, under the circumstances, no imprisonment; and

That the plaintiff, having entered the wharf with knowledge of the conditions imposed by the defendants, must be taken to have impliedly agreed

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that he would not ask for egress from the wharf by land without payment of another penny, and to have consented to the defendants preventing him from leaving in that way without such further payment, and, therefore, that the defendants' servants were justified in using such force as was reasonably necessary for that purpose.

Held, also, that even if this defence, being in the nature of leave and licence, was not technically open to the defendants under their plea, any necessary amendment to raise it should be made, the case having been throughout conducted irrespective of any point of pleading.

Although in the notice of appeal a new trial only was asked by the defendants, the Court in allowing the appeal, being of opinion that on the admitted facts no jury, if properly directed, could reasonably find a verdict for the plaintiff, ordered a verdict to be entered for the defendants.

Decision of the Supreme Court: *Robertson* v. *Balmain New Ferry Company Ltd.*, (1906) 6 S.R. (N.S.W.), 195, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

This was an action by the respondent for assault and false imprisonment, alleged to have been committed by the appellants' servants in forcibly preventing the respondent from leaving a wharf, the property of the appellants, under the following circumstances :—

The appellants carried on the business of a harbor steam ferry from the City of Sydney to Balmain, in connection with which they used a wharf and premises leased by them from the Harbor Trust Commissioners. Fares were not taken on the steamers or on the Balmain side, but were all collected on the Sydney wharf on the following system :—On the street side of the wharf were two registering turnstiles, one for entry, the other for exit. The turnstiles did not quite fill up the opening in which they moved, there being a space of some eight and a half inches between the outer edge of the turnstiles and the bulkhead. For the purposes of this case it may be taken that there was no other way of entering or leaving the wharf on the land side except by the turnstiles. An officer of the company was stationed at each turnstile. Passengers entering the wharf paid one penny to the officer at the entry turnstile, were admitted, and had then the right to travel by the company's steamers to Balmain. Similarly passengers leaving the wharf, whether they had travelled from

Balmain in the company's steamers or not, paid a penny to the officer at the exit turnstile, and were allowed to pass through to the street. The turnstile in each case automatically registered the number of passengers passing through, and was thus a check upon the officers' cash takings. Two photographs were put in by the plaintiff, respondent, one showing the exterior, the other the interior of the wharf, from which it appeared that there was a notice board a few feet over the turnstiles, on which were painted the words, "Notice. A fare of one penny must be paid on entering or leaving the wharf. No exception will be made to this rule, whether the passenger has travelled by the ferry or not." The notice was so placed that in the daytime, at least, it would be difficult for a passenger giving reasonable attention to his surroundings to avoid seeing it. The photographs also showed a large gas lamp so situated that at night time, if alight, it would throw a full light on the notice, but there was no direct evidence either that it was generally lit at night or that it was alight on the evening of the occurrence.

On the night of 5th June 1906 the respondent and a lady came to the wharf, and, with the intention of crossing to Balmain in one of the appellants' steamers, passed through the entrance turnstile, each paying a penny. When they had got to the water side of the wharf they found that the steamer had gone, and, instead of waiting for the next, they determined to go to another ferry company's wharf and cross the harbor by another steamer to Balmain. The respondent, seeing no way of getting from the wharf into the street except by the turnstiles, asked one of the officers at the turnstiles to show him the way out. The officer replied that there was only one way out, and that was through the turnstile. The respondent then asked if he was expected to pay on going out, seeing that he had not travelled by the steamer. The officer replied in the affirmative, and told him that unless he did pay he would not be allowed to go out through the turnstile. The respondent denied the company's right to make the charge, or to make its payment a condition of his being permitted to pass through the turnstile. The officer then called his attention to the notice. After some further conversation the respondent endeavoured to force his way through the eight and a-half inch

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space between the entrance turnstile and the bulkhead, but was prevented from doing so by the appellant company's officers, who used force for that purpose. After some twenty minutes, during which the respondent continued to assert and the officers to deny his right to pass out through the turnstiles without payment, the respondent eventually, in spite of opposing force on the part of the officers, squeezed his way out between the exit turnstile and the bulkhead and gained the street. These facts constituted the assault and false imprisonment for which the respondent sued.

At the trial of the action the respondent obtained a verdict for £100 damages, and, on appeal, the Supreme Court granted a rule *nisi* for a new trial or a nonsuit or verdict for the defendants on the grounds (1) that His Honor was in error in directing the jury that the trespass complained of was not within the scope of the servants' authority; (2) that he was in error in directing that the defendants had no right to demand the second penny; and (3) that he should have directed the jury that, if they came to the conclusion that the company had done what was reasonable to give persons going on the wharf notice of the terms on which they were admitted, the jury were entitled to find that the plaintiff was bound by that notice. The rule was subsequently discharged with costs: *Robertson* v. *Balmain New Ferry Co. Ltd.* (1).

From this decision, as to the second and third grounds of the rule *nisi* the present appeal was brought by special leave, the Court having refused to grant leave as to the first ground.

The foregoing statement of the facts is taken from the judgment of *O'Connor* J.

Rolin (*D. G. Ferguson* with him), for the appellants. The respondent brought upon himself the trouble of which he complains. He must be taken to have had notice of the conditions upon which he was admitted to the wharf. There was evidence from which the jury must have inferred that he did in fact know the terms of the printed notice. Even if there had been no evidence that he did in fact know those conditions, there was abundant evidence that the appellants did all that was reasonably to be expected of them in order to inform persons

(1) (1906) 6 S.R. (N.S.W.), 195.

using the wharf what the conditions of admittance were. It was not necessary to prove affirmatively that the respondent had knowledge of them: *Parker* v. *South Eastern Railway Company* (1); *Watkins* v. *Rymill* (2); *Richardson, Spence & Co.* v. *Rowntree* (3). The meaning of the notice was clear, viz., that any person who entered the wharf, whether through the turnstile or from a boat, would be prevented from leaving through the turnstile unless he paid a penny. That was a reasonable condition to impose under the circumstances, because it would be impossible for the appellants to carry on their business if it were necessary to inquire of each person whether he had actually travelled by boat or not. The respondent, therefore, when he entered the wharf, knew, and accepted as an implied term of the contract of carriage, that he would have to submit to such detention if he failed to carry out his part of the contract. There was no imprisonment, because he could have left the wharf by water: *Bird* v. *Jones* (4). The assault proved was not greater than was necessary to prevent the respondent from leaving, and was, therefore, only such as the respondent must have contemplated as likely to be used in case he should fail to carry out the contract to pay the second penny. Even if this defence amounts to leave and licence, it was open to the defendants under the plea of the general issue: *Bullen and Leake, Precedents of Pleadings*, 3rd ed., p. 792, citing *Christopherson* v. *Bare* (5). A verdict should be entered for the defendants without a new trial.

Even if the assault or imprisonment was not justified, and the respondent is entitled to a verdict, there should be a new trial on the question of damages. There was, at any rate, a contract by the respondent to pay the second penny, and the direction that it could not be demanded was erroneous. That direction affected the question of damages, because there was nothing wanton in the trespass; it was committed in the assertion of a legal right: *Bray* v. *Ford* (6).

Respondent, in person. The question is not whether I con-

(1) 2 C.P.D., 416.
(2) 10 Q.B.D., 178.
(3) (1894) A.C., 217.
(4) 7 Q.B., 742.
(5) 11 Q.B., 473.
(6) (1896) A.C., 44.

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tracted to pay a second penny before leaving the wharf, but whether the appellants had a right to imprison me if I failed to pay it. On the evidence, the position of the placard was not such as to make it reasonably clear to a person entering the turnstile. It cannot, therefore, be said that the appellants took all reasonable means to bring it to the attention of passengers. The mere placing of a notice on the wall is not sufficient: *Brooke* v. *Pickwick* (1).

[GRIFFITH C.J. referred to *Bywater* v. *Richardson* (2) and *Parker* v. *South Eastern Railway Co.* (3).]

If the meaning of it was what the appellants contend, it should have been actually brought to the knowledge of each passenger. If that is impracticable, they should adopt another method of dealing with the traffic. Their present system is wholly for their own benefit, not for that of the public. [He referred also to *Henderson* v. *Stevenson* (4); *Burke* v. *South Eastern Railway Co.* (5)]. But the notice is not reasonably capable of the meaning that the appellants seek to put upon it. It uses the word "fare," which implies that the person paying it has been conveyed by land or water. The natural construction is that any person who landed there, whether from a boat of the appellants or from one belonging to other persons, must pay at the turnstile. The use of the words "by the ferry" tend to support that view of the meaning. There was nothing in it to lead a person to expect that a breach of the peace would be committed if he abandoned his intention of travelling and wished to leave the wharf. I paid full consideration for admittance, and was entitled to abandon the contract there and then, whether I rendered myself liable to pay another penny or not. Even if that was the consequence, it was merely a civil liability enforceable in the ordinary way. In the Supreme Court it was not contended that the appellants had any right to detain a passenger under such circumstances, but that the appellants were not liable because it was not within the scope of the servants' authority to do what it was unlawful for their employers to do. Appellants' servants were really

(1) 4 Bing., 218.
(2) 1 A. & E., 508.
(3) 2 C.P.D., 416, at p. 423.
(4) L.R., 2 H. L. Sc., 470.
(5) 5 C.P.D., 1.

endeavouring by force to make me pay another penny, or as the appellants contend, to keep my contract. But it has never been held that in such a contract there is an implied term that the carrier may imprison in order to prevent a breach. [He referred to *Butler* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1).] There was clearly evidence of an imprisonment. The water surrounding the wharf was as much a barrier under the circumstances as a wall would have been. [He referred to *Farry* v. *Marshall*; *Farry* v. *Great Northern Railway Co.* (2).]

There was no proof of assent to the assault or imprisonment. That cannot be implied, but must be plainly proved, and must be specially pleaded: *Bullen and Leake Precedents of Pleadings*, 3rd ed., p. 792.

[BARTON J. referred to *Syers* v. *Chapman* (3).]

It is not a matter which can be given in evidence in mitigation of damages without being pleaded, because if pleaded, it is a defence to the action. Reasonable belief that the passenger owed another penny was here irrelevant on the question of damages, because the existence of such a debt in fact would not have excused the trespass. [He referred to *Chinn* v. *Morris* (4).]

The damages were not excessive. The jury might fairly have thought the circumstances of the trespass justified a substantial verdict, but not a vindictive one.

Even if the appeal is allowed, a verdict should not be entered for the defendants, but a new trial ordered, so that the issue of assent might be put clearly before the jury. Leave and licence not having been pleaded, the question whether I had notice of the suggested condition was not before the jury, and the appellants should not be allowed to assume that I had such notice and take advantage of it as of a fact proved: *Osborne* v. *London and North Western Railway Co.* (5). It was not contended that such a defence could be raised under the plea of not guilty.

Rolin, in reply.

Cur. adv. vult.

(1) 21 Q.B.D., 207.
(2) (1898) 2 I.R., 352.
(3) 2 C.B.N.S., 438.
(4) 2 C. and P., 361.
(5) 21 Q.B.D., 220, at p. 224.

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Dec. 18.

The following judgments were read:—

GRIFFITH C.J. I have had the opportunity of reading the judgment which will be delivered by my learned brother *O'Connor*, in which I fully concur. I will therefore only say a few words for myself. The first question that arises for consideration is: On what terms did the plaintiff ask for and obtain admittance to the defendants' premises? It is clear that the invitation which the defendants offered to members of the public to come upon their premises was conditional, and it must be taken that members of the public, who availed themselves of the permission, agreed to be bound by the terms on which it was granted so far as they were acquainted with them. There is no doubt that in fact the terms were that persons should obtain admittance on payment of one penny, and when admitted should be free to depart from the premises by water, but should not be entitled to egress by land except on payment of another sum of one penny. If the plaintiff was aware of these terms he must be held to have agreed to them when he obtained admission. If he had been a stranger who had never before been on the premises, it would have been sufficient for the defendants to prove that they had done what was reasonably sufficient to give the plaintiff notice of the conditions of admittance: *Parker* v. *South Eastern Railway Co.* (1), cited with approval in *Richardson* v. *Rowntree* (2). In this case, however, it appeared that the plaintiff had been on the premises before, and was aware of the existence of the turnstiles and of the purpose for which they were used. It was therefore established that he was aware of the terms on which he had obtained admittance, and it follows that he had agreed to be bound by them.

This agreement involves, in my opinion, an implied promise by the plaintiff that he would not ask for egress by land except on payment of one penny, and, further, a consent on his part that the defendants should be entitled to prevent him from departing in that way until he paid the penny. In the case of *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (3), it was taken for granted, and, I think rightly, that, if such an

(1) 2 C.P.D., 416.

(2) (1894) A.C., 217.

(3) 21 Q.B.D., 207.

agreement existed, the use of any necessary force to prevent a breach of it would be justified. As the plaintiff was free to leave the premises by water I think that there was no imprisonment: *Bird* v. *Jones* (1). And as to the alleged assault, there was no evidence that anything was done which was not authorized by the agreement to which the plaintiff was a party. The only point that could be made for him is that this defence, being in the nature of a plea of leave and licence, should have been specially pleaded. As, however, the case has been throughout conducted irrespective of any point of pleading, it is unnecessary to consider whether this point is technically a good one. Any necessary amendment should be made to raise the real question contested at the trial.

BARTON J. Having given long and careful consideration to the arguments and authorities, and having, like the Chief Justice, read the judgment to be delivered by my brother *O'Connor*, I am content to rest my conclusion on the reasons which are so clearly expressed in that judgment. I wish, however, to say a word or two with regard to a case that was strongly relied on by the respondent in his argument, namely, *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (2). I was at first disposed to think it applicable in favour of the respondent. But further examination has now convinced me that it is not so. Clearly there the contract of carriage continued. A condition of it was broken by the plaintiff, but, though probably liable for that breach in an action for the extra fare, he did not thereby become a trespasser so as to be lawfully removable from the defendant's carriage, but on the contrary was entitled to be carried to his destination which he was anxious to reach. Here the case is quite the other way. The respondent does not contend that he was holding to the contract to be carried across the water by the appellant company. So far from that, his whole conduct demonstrates that he had given up all thought of such a thing, and would itself have quite overthrown any such contention had he raised it. So that here there was not subsisting at the critical point the contract of carriage on which the decision in

(1) 7 Q.B., 742. (2) 21 Q.B.D., 207.

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Butler v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1) was based.

O'CONNOR J. The material facts of this case may be shortly stated. (His Honor then stated the facts as already reported, and continued.) It is admitted on this appeal that the company are responsible for what was done by their officers, so that there is left for our decision substantially one question only, namely, whether, on the facts, the company are liable to the plaintiff for false imprisonment and assault. The legal position on which the plaintiff relies may be thus stated:—He entered the wharf under a contract to be carried in the company's steamer from Sydney to Balmain. Before the contract was performed he decided to abandon it, and, having no further business on the wharf, became entitled to pass out to the street through the turnstiles, or, if not through them, at least through the eight and a-half inch space between the turnstile and the bulkhead. The company's officers by force prevented him from doing so, refused to allow him to pass out through the turnstile except on payment of a penny at the exit turnstile, and thus kept him imprisoned as a means of enforcing payment of that demand. He maintains that, even if he were bound to pay the extra penny as a matter of contract and it became a debt recoverable in the Courts, the company could not thus take the law into their own hands and deprive him of his liberty in order to enforce payment. If that were an accurate statement of the position the plaintiff's contention would be unanswerable. But it is not an accurate statement of the position. Undoubtedly it is not permissible for a creditor, except under due process of the law, to abridge the liberty of his debtor for the purpose of enforcing payment. But the abridgment of a man's liberty is not under all circumstances actionable. He may enter into a contract which necessarily involves the surrender of a portion of his liberty for a certain period, and if the act complained of is nothing more than a restraint in accordance with that surrender he cannot complain. Nor can he, without the assent of the other party, by electing to put an end to the contract, become entitled at once, unconditionally and irrespective of the other

(1) 21 Q.B.D., 207.

party's rights, to regain his liberty as if he had never surrendered it. A familiar instance of such a contract is that between a passenger and the railway company which undertakes to carry him on a journey. If the passenger suddenly during the journey decided to abandon it and to leave the train at the next station, being one at which the train was not timed to stop, he clearly would not be entitled to have the train stopped at that station. However much he might object, the railway company could lawfully carry him on to the next stopping place of that particular train. In such a case the passenger's liberty would be for a certain period restrained, but the restraint would not be actionable, because it is an implied term of such a contract that the passenger will permit the restraint of his liberty so far as may be necessary for the performance by the company of the contract of carriage according to the time table of that train. Or a person may conditionally, by his own act, place himself in such a position that he cannot complain of a certain restraint of his liberty. Take an illustration which was used in the course of the argument. Assume that the turnstiles on the company's wharf completely closed the opening between the bulkheads, that they were worked on the penny in the slot system, and would not open except when a penny dropped in the slot operated the mechanism. If under these circumstances the plaintiff, having opened the entry turnstile by his penny and entered the wharf, changed his mind about crossing in the company's steamers, and wished to return at once to the street, could he claim that he was not bound to use the ordinary means of opening the exit turnstile by dropping in his penny, but was entitled to break his way through it, or to demand from the company's officers that they should specially unlock the apparatus to enable him to pass out? If, under the circumstances, the officers refused to comply with his request, could it possibly be contended that the company would be liable to an action for false imprisonment? *Primâ facie*, no doubt, any restraint of a person's liberty without his consent is actionable. But, when the restraint is referable to the terms on which the person entered the premises in which he complains he was imprisoned, we must examine those terms before we can

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determine whether there has been an imprisonment which is actionable. The fallacy in the plaintiff's legal position lies in the assumption that, immediately he abandoned the contract to be carried to Balmain by the company's steamer, he was in the same position as if the wharf was one to which the public had free right of access, that, finding his exit barred by the turnstiles, he was entitled either to squeeze past them, or to demand from the company's officers that they should be specially released to let him through. Whether that assumption is or is not justifiable depends upon the terms on which the plaintiff was permitted to enter the wharf. In ascertaining those terms it must be remembered that the wharf was not a place to which the public had free right of access. If it had been so no one could legally place upon the wharf any bar or obstruction to the free entry or exit of any member of the public. But it was not a public place in that sense. It was private property. No one had a right to enter there without the company's permission, and they could impose on the members of the public any terms they thought fit as a condition of entering or leaving the premises. What were the terms on which the plaintiff entered the company's wharf? There was no express contract, and the terms must therefore be implied from the circumstances. In dealing with the circumstances I leave the question of the notice board out of consideration. In my view, it is immaterial whether the company did what was reasonable to direct public attention to the notice, or whether the plaintiff ever read it until his attention was called to it by the officer at the turnstile. But as to the material facts from which the contract must be implied there is no dispute. The plaintiff was aware that the only entrance to and exit from the wharf on the land side was through the turnstiles, and that, to quote his evidence, "When the turnstile was not released there was a complete barrier stretching across the whole entrance," in other words, entrance to and exit from the wharf were completely barred except when by the action of the officer in charge the turnstile was released. He also knew that the turnstiles were so constructed as to admit only persons entering the wharf through the entry turnstile, and only persons leaving the wharf through the

exit turnstile, that the passing through of every passenger was automatically registered by the turnstile, and that the automatic register was a check on the cash taken by the officer. He himself in speaking to one of the officers said, "If it is the question of putting out the tally of your turnstiles I can squeeze through there," referring to the eight and a-half inch space before mentioned. Having travelled on many occasions backward and forward by the company's boats, and, as he says, paid his fare to the officers at the turnstiles, he must have been aware that the company's method of conducting their business was to release the turnstiles only on payment of a penny, and that in every case where there was a departure from that method "the tally of the turnstile," as he terms it, would be thrown out.

Such being the condition of the company's premises, and such being their method of carrying on their business, the plaintiff paid his penny to the officer and went through the entry turnstile on to the wharf. The first question is, what is the contract to be implied from the plaintiff's payment at and passing through the turnstiles under these circumstances? It is that in consideration of that payment the company undertook to carry him as a passenger to Balmain by any of their ferry boats from that wharf. That is the only contract which could be implied from those circumstances, and the plaintiff was permitted to enter the wharf for the purpose of that contract being performed. It is not denied that the company were ready to perform their part, but the plaintiff, as far as one party can do so, rescinded the contract and determined to go back from the wharf to the street. What then were his rights? They were, in my opinion, no more and no less than they would have been if he had landed from his own boat at the company's wharf. He was on private property. He had not been forced or entrapped there. He had entered it of his own free will and with the knowledge that the only exit on the land side was through the turnstile, operated as a part of the company's system of collecting fares in the manner I have mentioned. If he wished to use the turnstile as a means of exit he could only do so on complying with the usual conditions on which the company opened them. The company were lawfully entitled to impose the condition of a penny payment on all who

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used the turnstiles, whether they had travelled by the company's steamers or not, and they were under no obligation to make an exception in the plaintiff's favour. The company, therefore, being lawfully entitled to impose that condition, and the plaintiff being free to pass out through the turnstile at any time on complying with it, he had only himself to blame for his detention, and there was no imprisonment of which he could legally complain. Next, had he the right to force his way through the narrow space between the turnstile and the bulkhead? Clearly he had not. If the turnstile had filled the whole space between the bulkheads, it could not be contended that the plaintiff would have been entitled to break it open in order to pass through. The company's officers were, in my opinion, entitled to regard the turnstile as blocking the whole space, not only for the necessary protection of the mechanism of the turnstiles from injury, but also because it was a necessary part of their system of collecting fares on entry and exit that the turnstile should be an effective barrier against entry and exit of any person except on the company's conditions. They were therefore entitled to prevent the plaintiff from squeezing through the space in question, and were justified in meeting the plaintiff's forcible attempt with as much force as was reasonably necessary to defeat it. It is not alleged that they did more, and any assault they may have committed on the plaintiff under these circumstances was justified. In this connection I may observe that it is not necessary to determine whether or not this justification is, strictly speaking, open to the company on the pleadings. The case has been conducted all through on the footing that it is open, and, if it were necessary, the Court would make any amendment required to formally shape the issues in accordance with the way in which both parties regarded them at the trial.

In the view I have taken of this case it has become unnecessary to refer to the decisions on notices which were cited on both sides. But I desire to point out that the principle laid down in *Butler* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1), relied on by Mr. Robertson, has no application. It was in that case common ground that, unless the contract of carriage had been

(1) 21 Q.B.D., 207.

determined by the plaintiff's conduct, he was not a trespasser in the defendants' carriage and could not be forcibly removed. The defendants' contention was that the failure on the part of the plaintiff to perform the condition of producing his ticket enabled the company to regard the contract of carriage as at an end and to treat the plaintiff as a trespasser. The plaintiff's case was that his breach of that condition, although it rendered him liable to an action, did not determine the contract, and that, as long as that subsisted, he was lawfully in the defendants' carriage and could not be treated as a trespasser. The Court of Appeal took the latter view and upheld the plaintiff's contention. The decision turned entirely on the question whether or not the contract of carriage had been determined. In this case it is admitted that the plaintiff himself had abandoned the contract under which he was to be carried in the company's steamers to Balmain. It is unnecessary to decide whether, if he had remained an unreasonable time on the wharf after the contract was at an end, refusing to leave it either by steamer or in compliance with the company's conditions by the turnstile, the company would not have been entitled to treat him as a trespasser and remove him. The company had asserted no right of that kind. If they had done so, the facts would have been more like those in *Butler* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1) with the important exception that there did not exist in this case any contract such as the contract which in that case gave the plaintiff a right to remain in the railway carriage.

Taking then the whole facts in this case together, the plaintiff, in my opinion, was not entitled to succeed, and the verdict which the jury returned in his favour must be set aside. The only remaining question is, whether this Court should grant a new trial, or order the verdict to be entered for the defendants. The Court may make any order which the Supreme Court ought to have made in the first instance. That Court ought, in my opinion, to have directed a verdict to be entered for the defendants. All the material facts were before them as they have been before us. It is impossible that any jury could on those facts find a verdict for the plaintiff which could stand for one moment if

(1) 21 Q.B.D., 207.

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questioned. The verdict ought therefore to have been entered for the defendants, and this Court must now order accordingly that the verdict for the plaintiff be set aside and judgment be entered for the defendants.

Appeal allowed. Order appealed from discharged. Order absolute to enter verdict for the defendants. Appellants to pay the respondent's costs of the appeal, undertaking to set off such costs against any costs payable by the respondent.

Solicitors for the appellants, *McDonell & Moffitt.*
Solicitor for the respondent, *J. J. Jagelman.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

PRIOR . . . . . APPELLANT;
DEFENDANT,

AND

LUDLOW . . . . . RESPONDENT.
PLAINTIFF,

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Oct.* 11, 12.

APPEAL from a decision of *Walker* J., 20th June 1906.

Griffith C.J., Barton and O'Connor JJ.

The case turned wholly on questions of fact.

Appeal dismissed with costs. Decree varied by consent. Appellant to pay respondent's costs of the appeal.

Solicitors, for appellant, *McCoy & McCoy.*
Solicitor, for respondent, *H. R. Way.*

C. A. W.