[HIGH COURT OF AUSTRALIA.]

VICTORIAN RAILWAYS COMMISSIONERS Appellants; Defendants,

AND

CAMPBELL AND OTHERS . . . . Respondents. Plaintiffs,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1907.

Melbourne, *June* 26.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Negligence—Railways—Fire escaping from engine—Omission to burn grass within railway fences—Liability of Commissioners—Occupation of railway land by another person—Railways Act 1890 (*Vict.*), (*No.* 1135), *sec.* 115.

The Victorian Railways Commissioners are not relieved from the liability which, according to the decision of the Supreme Court of Victoria in *Dennis* v. *Victorian Railways Commissioner*, 28 V.L.R., 576; 24 A.L.T., 196, attaches to them for damages arising from their negligent omission to burn or clear off grass naturally growing within the railway fences, whereby sparks from an engine set fire to that grass and that fire spread to adjoining land, by an agreement, not made by direction of the Governor in Council, whereby they permit a third person to occupy and use for grazing purposes the land within the railway fences, and, in consideration thereof, that person agrees to take every reasonable precaution to prevent fire spreading on the land, and to permit the Commissioners by their servants to enter on the land and burn off the grass should they consider it necessary.

Dennis v. *Victorian Railways Commissioner*, 28 V.L.R., 576; 24 A.L.T., 196, approved.

Decision of the Supreme Court affirmed.

Appeal from the Supreme Court of Victoria.

An action had been brought by Charles Campbell against the Victorian Railways Commissioners to recover damages for loss

sustained by reason of the negligence of the defendants whereby sparks from an engine on the railway of the defendants set fire to the grass on the defendants' land whence the fire spread to an adjoining road and then to plaintiff's land and did much damage. One of the acts of negligence alleged was :—" Permitting the said grass upon the defendants' land to be and remain thereon in great quantity and of great length and in a dry and highly inflammable and dangerous condition in hot and dry weather, when the defendants knew, or ought to have known, that it was likely that sparks or burning matter might escape from the said engine and set fire to the said grass, and that the fire so set alight in the defendants' said grass might spread on to the said road and thence on to the land of the plaintiff."

The action having been referred to arbitration, pursuant to sec. 21 of the *Railway Act* 1896, *Chomley* J., who was appointed arbitrator, made an award, which, so far as material, was as follows :—" I do find and determine that the defendants in this action were and are guilty of negligence in omitting by themselves and their servants to burn, clear off, or take reasonable precautions to prevent ignition of the dry and inflammable grass and herbage naturally growing on certain land within the railway fences of the line of railway in the writ mentioned, and that, by reason of such negligent omission, sparks escaping without any negligence on the part of the defendants or their servants from the defendants' locomotive engine, set on fire such grass and herbage, and thence such fire spread to and damaged and injured the plaintiff's land and fences. And I find and determine that the land on which such fire commenced was land vested in the defendants, and that it did not appear to the Governor in Council that such land was in excess of the quantity required for the purposes of such railways, and that such land had not been disposed of by direction of the Governor in Council under sec. 115 of the *Railways Act* 1890, and that although the Railways Commissioner,* the defendants' predecessor in title, and the defendants allowed one Harvey Tucker to use the land in ques-

*At the time the agreement referred to was made, the Government Railways were vested in one Commissioner, but at the time the fire in question happened they were vested in three Commissioners.—[ED.]

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tion on the terms stated in the document hereto annexed (marked Exhibit No. 14), such document was not made by the direction of the Governor in Council under the said sec. 115, and the defendants and their predecessors in title in fact exercised the powers purported to have been conferred upon them by the said document by cutting a chipped strip thereon, and burning off, or attempting to burn off, the grass on the said land, and by keeping and maintaining their telegraph poles thereon. And I find and determine that under the above circumstances the defendants were not relieved from responsibility for the condition of the said land and the grass thereon." His Honor then assessed the damages at £606 16s. 8d.

The material parts of the document referred to in the award as Exhibit No. 14 were as follows :—

"In consideration of the Victorian Railways Commissioner, hereinafter called the Commissioner, allowing me permission to occupy the land approximately shown or described at foot hereof, situate at or near 19 miles 14 chains on the Ballarat and Ararat line of railway, and near to Trawalla Station, and allowing me to use the said land and any fences and buildings thereon at reasonable times and under the control of the station-master or officer in charge of the said section of the line (as the case may be) for the time being for grazing purposes—

"I hereby acknowledge and agree as follows, that is to say :—

"1. That the said land and any fences and buildings are to be used by me at the will of the Commissioner, and such privilege shall not continue after the expiration of one calendar month's notice by the Commissioner to determine this tenancy; such notice may be without reference to any rent paid in advance for an unexpired period.

"2. That I attorn as tenant to the Commissioner in respect of the said land and any fences and buildings, and agree to pay when due all rates and taxes, and, without deduction, a rental of 20s. per annum in advance from the first day of May, 1898.

"3. That I will, as far as possible, give the Commissioner notice of my intention to vacate the land or buildings, or, if not, intimation of my actual vacation of the land.

"5. That I will not enter upon or cross over the railway, nor

allow any horses, cows, bullocks, sheep, or other animals under my control to trespass thereon, and I will keep in a good state of repair all fences now standing, or which I may find it necessary, or may be required, to erect, and take every precaution to prevent the spreading of fire on the land; and I agree to allow the Commissioner, by his officers or servants, to enter upon the land and burn off the grass should they consider it necessary.

"8. That the Commissioner shall in no way be liable to pay compensation for anything done or not done in respect of the land or any fences or buildings or otherwise herein referred to, nor for any damage whatsoever by fire, flood, lightning or tempest.

"9. That this document may be pleaded if necessary as leave and licence to the Commissioner and his officers or servants and all persons assisting him or them, for anything done under these presents."

This document was signed by Harvey Tucker only.

Charles Campbell having died, an action was brought by his executrix and executors against the Commissioners upon the award, and, by consent, a special case was stated by the parties for the opinion of the Full Court on the following questions:—

"In view of the findings of the arbitrator as appearing on the face of the award, should the award be set aside on the ground that the arbitrator was wrong in determining that under the circumstances the defendants were not relieved from responsibility for the condition of the said land and the grass and herbage thereon?"

The Full Court having answered the question in the negative, judgment was ordered to be entered for the plaintiffs for £606 16s. 8d. with costs.

The defendants now appealed to the High Court.

Schutt (with him *Arthur*), for the appellants. Notwithstanding sec. 115 of the *Railways Act* 1890, the Commissioners can deal with surplus lands in the way they have done in this case. The power in the agreement of the Commissioners to enter upon the land and burn the grass is in order to protect their own property and not in order to protect other persons. The Com-

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missioners had with that exception divested themselves of the power to burn the grass on this land, and so it is not negligence on their part if they do not burn the grass. The agreement is in the nature of a *profit a prendre*, which gives no interest in the land, but is a grant as regards the grass: *Thomas* v. *Sorrell* (1); *Frank Warr & Co. Ltd.* v. *London County Council* (2). In order to get the benefit of it, Tucker had permission to go on the land at certain times, and when he goes on he is entitled to have the grass eaten by his cattle. Apart from the special clause 5, the Commissioners would have no right to burn the grass, and that clause does not give a general control of the land to the Commissioners, but only a power to go in and burn the grass for their own protection.

[Counsel also referred to *Coverdale* v. *Charlton* (3).]

McArthur and *Lewers*, for the respondents, were not called upon.

GRIFFITH C.J. In *Dennis* v. *Victorian Railways Commissioner* (4), the Supreme Court of Victoria laid down this rule as stated in the head note:—"In an action for damages for losses caused by sparks from a railway engine belonging to the defendant, which engine was properly constructed and managed, the omission on the part of the defendant to burn or clear off grass and herbage naturally growing on the land of the defendant within the fences of the line of railway, which grass and herbage was ignited by a passing train, may be evidence of actionable negligence which should be left to the jury." In the present case the arbitrator, to whom the matter was referred in pursuance of the Statute, found that the defendants had been guilty of a negligent omission to burn, clear off, or take reasonable precautions to prevent ignition of the dry and inflammable grass and herbage naturally growing on certain land within the railway fences, whereby injury accrued to the original plaintiff. So far, the case is exactly within *Dennis* v. *Victorian Railways Commissioner* (4), with which I venture to express my entire

(1) Vaugh., 351.
(2) (1904) 1 K.B., 713, at p. 721.
(3) 4 Q.B.D., 104, at p. 121.
(4) 28 V.L.R., 576; 24 A.L.T., 196.

concurrence. The defence made is that, although the land was within the railway fences, the appellants had parted with the possession of it and were not in a position to do acts, the omission to do which is the foundation of the respondents' claim. The obligation of the appellants arises in this way. They are empowered by Statute to run engines upon their railways: the running of engines emitting sparks is a dangerous operation: Therefor, although the running of engines is made lawful, the appellants are, in running them, bound to take precautions to prevent unnecessary sparks from being emitted. In this case it is found that they took those reasonable precautions. But then in a country like Australia a further danger arises if there is long grass growing within the railway fences, for it is likely to catch fire and the fire is likely to spread to the adjoining land. Accordingly in *Dennis* v. *Victorian Railways Commissioner* (1) the Supreme Court held that the Commissioner was bound to take precautions to prevent that consequence. That obligation attaches to the appellants because they have possession of the land for the purpose of performing their statutory duty. Sec. 115 of the *Railways Act* 1890 allows the Commissioners to lease any surplus lands by direction and with the approval of the Governor in Council. They are, therefore, authorized to part with the possession of land by demise. The agreement set up in the present case is not a demise authorized by the Governor in Council within that section. It is a document of a singular character, by which it is suggested that the land had been demised to one Tucker. The document which was not signed by the Commissioner, but only by the alleged tenant, recites that, in consideration of the Commissioner allowing Tucker to use the land and fences at reasonable times and under the control of the station-master, Tucker made certain acknowledgments; he agreed to pay the taxes and a rent of £1 a year, and that he might be turned out by the Commissioner at a month's notice, and he was to give a similar notice if he intended to vacate the land. It was intended, therefore, that he should have the occupation of the land, but only for grazing purposes. It was, however, expressly stipulated in these words:—"I will . . . take every precau-

(1) 28 V.L.R., 576; 24 A.L.T., 196.

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tion to prevent the spreading of fire on the land; and I agree to allow the Commissioner, by his officer or servants, to enter upon the land and burn off the grass should they consider it necessary." The foundation of the Commissioners' duty being as I have stated, it is not easy to see how that duty is got rid of by allowing somebody else to graze his cattle on the land with a promise that he will prevent the spread of fire, and with the reservation to the Commissioners of the power to enter upon the land and burn off the grass. It appears to me that the Commissioners retained absolute control of the land with the attendant obligation to take precautions against the danger arising from there being long grass upon the land. Under these circumstances the duty *primâ facie* imposed upon them still continued. Therefore I think that the Supreme Court was right and that the appeal fails.

I should like to add that, if this so-called agreement had not contained the stipulation referred to, a very interesting question would have arisen, viz., whether the Commissioners could make a valid agreement which would have the result of exonerating them from the duty of keeping the grass in a safe condition.

BARTON J. I am of the same opinion.

ISAACS J. The argument for the appellants starts by admitting the correctness of the decision in *Dennis* v. *Victorian Railways Commissioner* (1). It is then sought to distinguish this case from that only in one way, that is to say, by showing that the land had passed out of the control of the appellants. I think that contention fails. The document by which Tucker got the right of occupation of the land expressly reserved very considerable control to the Commissioners. The use of the land is only for grazing purposes and is expressly limited by the words:— "At reasonable times and under the control of the station-master or officer in charge of the said section of the line (as the case may be)." And then in addition Tucker agrees to take "every precaution to prevent the spreading of fire on the land." There is no limitation to that. Then the Commissioner put in words which to my mind, reserve the most absolute control with regard to

(1) 28 V.L.R., 576; 24 A.L.T., 196.

that very matter, viz.:—"I agree to allow the Commissioner, by his officers or servants, to enter upon the land and burn off the grass should they consider it necessary." It is very difficult to imagine words more distinct to reserve control, and, as the only argument to differentiate this case from *Dennis* v. *Victorian Railways Commissioner* (1), was that the Commissioners had lost control of the land, I think the reference which has just been made to that agreement disposes of that objection. I therefore think the appeal should be dismissed.

HIGGINS J. I concur. I think the Commissioners cannot keep control of the land and at the same time escape the consequences of having that control.

Appeal dismissed with costs.

Solicitor, for appellants, *Guinness*, Crown Solicitor for Victoria.
Solicitors, for respondents, *Blake & Riggall*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

McGEE . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Appeal to High Court—Special leave—Appeal in criminal matter.

The High Court will not grant special leave to appeal in a criminal matter unless there is reason to think that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

In re Dillet, 12 App. Cas., 459; *Ex parte Deeming*, (1892) A.C., 422; and *Kops* v. *The Queen*; *Ex parte Kops*, (1894) A.C., 650, followed.

Therefore, where on a criminal trial a written statement made by a person supposed to be about to die, and who had since died, was admitted in evidence

(1) 28 V.L.R., 576; 24 A.L.T., 196.