[HIGH COURT OF AUSTRALIA.]

THE PRESIDENT, &c., OF THE SHIRE OF BENALLA . . . . . Defendants, } Appellants;

AND

CHERRY . . . . . Plaintiff, } Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE. *September* 15, 18, 19, 25.

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

Local Government—Highway—Drain—Negligence—Nuisance—Duty of municipal authority—User of highway—Animal straying on highway—Accident unlikely to happen—Police Offences Act 1890 (*Vict.*) (*No.* 1126), *secs.* 15, 96.

A drain constructed by a municipal authority on a highway for the purpose of draining a highway is not in itself an indictable nuisance.

The duty of a municipal authority, which has lawfully constructed an open drain on a highway for the purpose of draining it, is only to guard against injuries which may reasonably be anticipated as likely to arise from its condition, and that duty is towards persons, or owners of animals, using the highway for the ordinary purposes of a highway.

In a portion of a street, which was a *cul de sac* and was not much used for traffic, a municipal authority constructed an open drain with sloping sides which was about 4 feet deep at the deepest part, where an underground pipe discharged into it the drainage from another part of the road, and ran out to a shallow depression at the other end. The drain was 15 inches wide at the bottom and at the deepest part was about 5 feet wide at the top. The plaintiff's horse having escaped from a paddock, wandered to this street, entered the drain at its shallow end, walked up it to the deepest part, and, not being able to get any further, or to turn round and return by the way it came, injured itself in its efforts to extricate itself, and died soon after being extricated. The deepest part of the drain was protected to a certain extent by fences, but the lower end was not fenced across. In an action by the plaintiff against the municipal authority to recover damages,

Held, that the municipal authority was not shown to have been guilty of any breach of duty, and that even if it were the injury complained of did not arise in consequence of such breach.

Decision of the Supreme Court of Victoria: *Cherry* v. *President &c. of the Shire of Benalla*, (1911) V.L.R., 183; 32 A.L.T., 174, reversed.

APPEAL by special leave from the Supreme Court of Victoria.

An action was brought in the County Court at Benalla by Edward Cherry against the President, Councillors and Ratepayers of the Shire of Benalla, claiming £50 damages for the loss of his horse caused by the alleged negligence of the defendants in the construction and maintenance of a drain upon a street within the shire into which it was said the horse fell and, being unable to get out, died.

The facts are fully set out in the judgments hereunder.

The Judge of the County Court found that the drain in question was a nuisance, was highly dangerous, and was a trap; that once a horse got in, it could not get out; that the horse had got into the drain where it was shallow and, wandering up to the deep part, had got jammed, and being unable to get out, had died from exposure; that anyone could see that the accident was likely to happen; that the horse had escaped from a safe and secure paddock where it had been put by the plaintiff; and that there was no contributory negligence on the part of the plaintiff. Upon these findings the Judge entered judgment for the plaintiff for £41 with costs.

The defendants having appealed to the Supreme Court, that Court by a majority dismissed the appeal: (*Cherry* v. *President &c. of the Shire of Benalla* (1)).

From this judgment the defendants now, by special leave, appealed to the High Court.

Dethbridge (with him *Cussen*), for the appellants. The drain was lawfully made, and the accident was not one which the defendants could be called upon to provide against. Their only duty is to guard against accidents which might reasonably be foreseen, and they have no duty to guard against wholly improbable accidents: *Pearson* v. *Cox* (2). Even if the defendants

(1) (1911) V.L.R., 183; 32 A.L.T., 174. (2) 2 C.P.D., 369.

H. C. OF A. 1911.

BENALLA CORPORATION v. CHERRY.

should have guarded against the only probable danger which might arise from this drain, namely, that a horse might fall into the deep part, and therefore should have fenced in that part of it, the present accident could equally have occurred if that had been done, so that the injury complained of was not caused by the breach of duty. In that view it is immaterial whether the horse was lawfully or unlawfully upon the highway: *Harrold* v. *Watney* (1). But the respondent's horse was a trespasser and was unlawfully upon the highway, and therefore the defendants owe no duty to the respondent in respect of it: *Grand Trunk Railway of Canada* v. *Barnett* (2); *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Wallis* (3), unless the obstruction is a trap in the sense that it amounts to an invitation: *Bird* v. *Holbrook* (4); *Lynch* v. *Nurdin* (5).

[GRIFFITH C.J. referred to *Lowery* v. *Walker* (6)].

[Counsel also referred to *Watkins* v. *Great Western Railway Co.* (7); *Davies* v. *Mann* (8); *Deane* v. *Clayton* (9): *Blyth* v. *Topham* (10); *Pollock on Torts*, 8th ed., 437].

Paul (with him *Cohen*), for the respondent. The appellants owed a duty to the respondent to take steps to prevent the happening of this kind of accident. This excavation is as much a pit dug in the street as a drain, and the digging of it was wholly unlawful. It is found to be a nuisance and a trap, and the evidence supports that finding. Under sec. 15 of the *Police Offences Act* 1890 the appellants, in not fencing and lighting the hole, were guilty of an indictable offence, so that the leaving it unprotected was an unlawful act and it constituted a nuisance. The appellants should have foreseen the probability of such an accident happening and should therefore have taken reasonable steps to prevent it. The respondent's horse was not a trespasser, and was not unlawfully on the highway so far as the appellants are concerned. The appellants are not the owners or occupiers of the roads in their district except for the purpose of impounding:

(1) (1898) 2 Q.B., 320.
(2) (1911) A.C., 361.
(3) 14 C.B., 213; 23 L.J.C.P., 85.
(4) 4 Bing., 628.
(5) 1 Q B., 29.
(6) (1910) 1 K.B., 173.
(7) 46 L.J.C.P., 817.
(8) 10 M. & W., 546.
(9) 7 Taunt., 489, at p. 531.
(10) Cro. Jac. 158.

Local Government Act 1903, sec. 497. The fact that the appellants might have impounded the horse does not make its presence on the road unlawful. [He referred to the *Pounds Act* 1890, sec. 15; *Local Government Act* 1903, sec. 498, 13th Schedule, Part I., Div. (9), Cl. 41; *Main* v. *Robertson* (1); *Municipal District of Concord* v. *Coles* (2); *Municipal Council of Sydney* v. *Young* (3).]

[*Dethridge* referred to *Harrison* v. *Duke of Rutland* (4).]

It was a reasonable thing for the appellants to expect that horses would trespass upon the road. The user of a road is not limited to passing and repassing: *Hadwell* v. *Righton* (5). If what the appellants did was an unlawful act or a nuisance they are liable for injuries caused to persons who are trespassers. [He referred to *Ponting* v. *Noakes* (6); *Ilott* v. *Wilkes* (7); *Bird* v. *Holbrook* (8); *Jordin* v. *Crump* (9); *Harrold* v. *Watney* (10); *Smyth* v. *President &c. of the Shire of Kyneton* (11); *Boyle* v. *President &c. of the Shire of Mornington* (12); *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Wallis* (13); *Fawcett* v. *York and North Midland Railway Co.* (14); *Charman* v. *South Eastern Railway Co.* (15).] Whether it was reasonable or not for the appellants to have taken precautions against an accident of this kind happening is a question of fact, and there is ample evidence to support the finding that it was. [He also referred to *Unger* v. *President &c. of the Shire of Eltham* (16); *Campbell* v. *Paddington Borough Council* (17).]

Dethridge, in reply. Sec. 15 of the *Police Offences Act* 1890 only applies to a hole made for an extraordinary purpose, and not to a drain lawfully made by a municipal authority to drain a highway. See *Police Offences Act* 1890, sec. 96. A person complaining of a public nuisance must show a particular injury arising to himself from that nuisance: *Clerk and Lindsell on*

(1) 2 V.L.R. (L.), 25.
(2) 3 C.L.R., 96.
(3) (1898) A.C., 457.
(4) (1893) 1 Q.B., 142.
(5) (1907) 2 K.B., 345.
(6) (1894) 2 Q.B., 281.
(7) 3 B. & A., 304.
(8) 4 Bing., 628.
(9) 8 M. & W., 782, at p. 788.
(10) (1898) 2 Q.B., 320.
(11) 8 V.L.R. (L.), 231.
(12) 9 V.L.R. (L.), 265; 5 A.L.T., 83.
(13) 14 C.B., 213; 23 L.J.C.P., 85.
(14) 16 Q.B., 610.
(15) 21 Q.B.D., 524.
(16) 28 V.L.R., 322; 24 A.L.T., 96.
(17) 27 T.L.R., 232.

H. C OF A. 1911.

BENALLA CORPORATION v. CHERRY.

Torts, 5th ed., p. 28; *Mayor of Colchester* v. *Brooke* (1); *Ricket* v. *Metropolitan Railway Co.* (2). If this drain amounted to a nuisance to persons lawfully using the highway, no right of action is given to a person using the highway for unlawful purposes, or for other than the purposes of a highway: *Barker* v. *Herbert* (3).

Cur. adv. vult.

Sept. 25.

GRIFFITH C.J. This was an action in a County Court against the appellants claiming damages for the loss of a horse that sustained injuries from which it died owing to the negligent or wrongful construction or maintenance of a drain on a highway in the shire which the appellants governed. The place where the damage was sustained is the end of a street called Deas Street in the country town of Benalla. The street, according to the plan, is about $1\frac{1}{2}$ chains in width running from west to east, and the part in question is a *cul de sac* about $4\frac{1}{2}$ chains long, terminating at a public reserve. The footpaths have been formed on both sides leading to the reserve, and on the southern side are one or two houses. From that description it is evident that the place is not used for through traffic, but we are told that visitors to the reserve tie up their horses to the fences on each side. The surface of the street is slightly worn by traffic in the middle, but the rest is covered with grass. The slope is from west to east. On the north side of the street the council constructed an open drain into which a 15 inch underground pipe coming from the westward discharged at a depth of about 4 feet from the surface. The drain then ran from west to east for about 3 chains at a slope less than that of the natural surface, so that the depth gradually diminished to 18 inches. It then ran as a shallow depression obliquely across the street, terminating at a culvert going under a footpath crossing the street near the end and opening at one end into the reserve. At the western extremity of the drain the defendants placed a guard fence across the end and other fences extending about 11 feet on each side of the drain. The width of the bottom of the drain is about 15

(1) 7 Q.B., 339, at p. 377. (2) 5 B. & S., 149, at p. 159.
(3) 27 T.L.R., 252, 488.

inches throughout. The plaintiff's horse was placed by him in a paddock about a quarter of a mile away at 2 p.m. on a Sunday, and on the following Monday morning was found in the drain at a place where it was about 3 feet 9 inches deep, the width at the top being 5 feet. It appeared from the footprints that the horse had walked up the drain from the lower end, and, being unable to turn, tried to scramble out, and in doing so strained and exhausted itself so much that it died soon after being extricated. The plaintiff said that the paddock in which he had put his horse was secure, but he admitted that the horse had been out of it before and on the street.

By the law of Victoria as to impounding the council are for the purposes of impounding to be deemed the owners or occupiers of streets in their shire. There can be no doubt that the horse was trespassing and was liable to be impounded by the council. The County Court Judge thought that the drain was a nuisance and that the appellants were liable. On appeal to the Supreme Court it was contended, amongst other points, that, as the horse had no right to be on the road, the appellants were not liable for any injury that the horse might sustain, but the majority of the Court thought that that circumstance was immaterial since the appellants were guilty of a nuisance—by which I understand them to mean an indictable nuisance. A great number of cases in which trespassers or the owners of trespassing animals had obtained damages in actions have been cited, but in all those cases, except in *Barnes* v. *Ward* (1), the defendants had failed in the performance of a statutory duty. *Barnes* v. *Ward* (1) was a case where the defendant had dug a hole on his land on the margin of a public street without fencing it in, and a person while lawfully walking along the road fell into the hole and was killed. That hole no doubt was a nuisance. But, if the person who fell into the hole had been trespassing on the defendant's land and coming across it to the road, the result no doubt would have been different. In this Court Mr. *Paul*, who argued the case very ably for the respondent, urged first of all that the defendants were guilty of a breach of a statutory duty, relying on sec. 15 of the *Police Offences Act* 1890 which provides that :—

(1) 9 C.B., 392.

H. C. of A. 1911.

Benalla Corporation v. Cherry.

Griffith C.J.

"If any person commit any of the next following offences, he shall on conviction forfeit and pay a penalty not exceeding One hundred pounds. . . . .

"(ii.) Leaving any hole excavation or dangerous formation in or near any public place or thoroughfare without fencing or enclosing the same or keeping a light burning upon such enclosure from sunset to sunrise."

It is very doubtful whether that section would apply to municipal corporations such as the defendants, but it is not necessary to consider that point because sec. 96 of the same Act provides that:—"Nothing contained in Parts I. and II. of this Act shall take from lessen or alter any powers or privileges now possessed by or which may hereafter be given to any corporate body; but the same may be exercised and enjoyed to the same extent as if this Act had not been passed." Sec. 15, therefore, which is in Part II., has no application, and that argument fails.

In my opinion the Supreme Court—and I say so with respect—fell into the error of treating the case as one in which the appellants were clearly guilty of an indictable nuisance. The ordinary person who digs a hole in a road is, of course, guilty of an indictable nuisance, but it is the duty of the appellants to dig holes in roads for certain purposes. When they disturbed the surface of the street to make this drain they were doing their duty, and were not breaking the law. They had power to make the road and dig the drain, so that no objection can be taken to the making of the excavation itself. The only complaint that can be made is as to the omission to fence the excavation. Their duty in that respect was a duty to do whatever was reasonably necessary to prevent persons or animals likely to use the road for the ordinary purposes of a highway from suffering injury by reason of the hole in the course of that use. A municipal authority does not warrant the absolute safety of a highway to every person using it, and they certainly are not bound to take precautions for the protection of persons who propose to use the roads as a racecourse or a grazing paddock. I will assume that a mere error on the part of the council in this respect would be sufficient to justify a conviction for an indictable nuisance. I will

assume that *Reg.* v. *Burt* (1) supports that view, but I doubt whether it does. Still the question in this case is whether there was any want of reasonable care. When the question of what is reasonable arises, regard must be had to all the circumstances of the case including the place where the accident happened, and the mode of user of the place. The extent of the area under the control of the municipality and the means at their disposal may also be material for consideration. The precautions to be taken, as already suggested, are only against such injuries as may be reasonably anticipated in the absence of precautions. As was said by *Brett* L.J. in *Pearson* v. *Cox* (2), you need not take precautions against things that are not likely to happen.

The precaution suggested here is the running of a fence along each side of the drain for its whole length. I think that, having regard to the nature of the place, that would be a highly unreasonable thing to expect the appellants to do. The place is seldom used except in daylight, and is used by persons acquainted with its condition. It is extremely unlikely that any person going along the road to the reserve would fall into the drain, or that anyone crossing it would fall into it or, if he did, would be injured. In my opinion there was no evidence of want of reasonable care fit to be left to a jury on a charge of an indictable nuisance. But suppose there were, there is still another position by way of answer to the claim, namely, that there is no connection between the omitted precaution and the accident. Suppose that two fences were erected along the dangerous part of the drain, then, unless the lower end were blocked up, the horse would still have got up the drain, and I do not think it could be suggested that the whole of the drain should have been surrounded by a fence. It is therefore unnecessary to decide the question which the Supreme Court thought the crucial question, namely, whether the mere fact that the horse was trespassing would be fatal to the plaintiff's claim. The general rule as to trespassers is laid down in *Grand Trunk Railway of Canada* v. *Barnett* (3), but it is not necessary to express any opinion on the subject.

(1) 11 Cox C.C., 399.

(2) 2 C.P.D., 369, at p. 373.

(3) (1911) A.C., 361.

H. C. OF A. 1911.

BENALLA CORPORATION v. CHERRY.

For these reasons I think the appeal should be allowed. The case is of importance, not exactly on the point upon which special leave to appeal was granted, but as to the rules that are to be applied to and govern municipal authorities in the execution of their statutory duties.

Barton J.

BARTON J. read the following judgment:—I am of the same opinion, and rest my conclusion on the ground that the defendant shire was under no duty to the plaintiff to make provision in the construction and maintenance of the drain against damage occurring to him in respect of his horse when straying on the street. I fail to see how the shire can be under any such duty to persons who cannot be supposed to be using the road for the purposes of a highway. This is not an accident which is so likely to happen that its probable occurrence ought to be in the contemplation of a reasonable person or body charged with the duty of maintaining the highway. There was not, therefore, any duty to make provision against it. I have nothing to add except to repeat the concluding words of the judgment of *Brett* L J. in *Pearson* v. *Cox* (1), which I think are applicable to this case:—"When there is no evidence that the accident is one which would probably happen, then if the jury were to find that any one was bound to guard against a wholly improbable accident, that is not a conclusion which a reasonable man would come to. There was no such evidence." That passage expresses my opinion in the present case.

O'CONNOR J. I am of the same opinion. I cannot help thinking that the learned Judge who delivered the judgment of the majority of the Supreme Court was misled into attaching too much importance to the cases cited to him dealing with the rights of trespassers on highways. The considerations upon which those cases proceeded seem to me to have no application to the present case. I need not refer to the facts, which have been fully set out in the judgment of the learned Chief Justice. Shortly stated, the position was this: The locality, having regard to its use and its situation, was not, except in name, a highway,

(1) 2 C.P.D., 369, at p. 374.

or part of a highway. And it is clear that to persons using it as a highway ordinarily is used, there was no danger whatever in this drain. One could hardly suppose it possible that the plaintiff, if he was riding or driving his own horse, whether attached to a vehicle or not, along this street, could have made the defendants liable for the horse getting into the drain. But under the circumstances in which the horse did become injured it is alleged that the plaintiff had a right to bring this action. He bases his right upon the following ground. He says that his horse which strayed upon the highway was there under such circumstances that the plaintiff was entitled to have the drain so kept and maintained that no injury should occur to the horse while so straying. I assume that the horse was on the highway without default on the part of the plaintiff, and also that in such places as this horses may be expected occasionally to stray on the highway. Persons are entitled to drive cattle and horses on the highway, and it is well recognized that cattle and horses without default of their owners may get loose on the highway, or may wander there. Under these circumstances the question arises, what is the duty which those in charge of the highways owe to the owners of the animals?

The case for the plaintiff was put on two grounds, nuisance and negligence. It was charged that the drain was a nuisance, first, because it was constructed and maintained in violation of the *Police Offences Act* 1890, sec. 15, that under the provisions of that section the excavation ought to have been fenced. I agree that that section can have no application to a case of this kind. The part of the *Police Offences Act* in which that section occurs is expressly made applicable to the whole of Victoria. If the respondent's view is right the obligations alleged would attach to local bodies all over Victoria—a position so utterly unreasonable on the face of it that the appellants contend that the section was not intended to apply to such a case. But the matter is put beyond doubt by the provisions of sec. 96 of the *Police Offences Act* 1890, which expressly declares that the provisions of the Act shall in no way interfere with the rights and obligations of corporate bodies under other Acts.

Nor can it be said that the drain is a nuisance as being a hole

H. C. OF A. 1911.

BENALLA CORPORATION v. CHERRY.

O'CONNOR J.

dug in a highway, because the very duty for which a local body is constituted is to make drains of that kind which are necessary to carry water off the highways. The only way in which it can be said that the defendants are liable is that they are under an obligation to use due care in the construction and maintenance of works of this kind. We may take it that it was necessary to have the drain constructed. It is not complained that it was not constructed in a proper way, but it is said that it ought to have been fenced. What is the duty of a local body in regard to a drain across a highway? A local body is bound to maintain a road as a highway, and owners of horses, whether they are driven or allowed to wander, have no greater right in regard to the highway than persons who use it for passing and repassing. They have no right to use the highway as a place for horses to graze in. The only right they have is to demand that the highway shall be a safe place for its ordinary use as a highway, namely, for passing and repassing without danger. It is obvious that if the road had been used merely for the purpose of the horse passing and repassing there would have been no danger. The danger really arose because the horse walked into the drain and up it, going in at the shallow part and becoming involved in the impossibility of getting out at the deep part, where he attempted to jump out and failed. Under those circumstances the only way in which the accident could have been prevented was by fencing the whole of the drain. It is obvious that the shire cannot have that duty imposed on them under the circumstances proved. There can be no obligation in so far as the use of the highway is concerned to put up such a fence. In my opinion, therefore, the plaintiff has only shown that his horse was injured by reason of something which it was not the duty of the local body to provide against. Under those circumstances I agree that the appeal must be allowed.

Appeal allowed. Judgment appealed from reversed. Judgment for the defendants in the County Court without costs. Appellants to pay the respondent's costs of this appeal.

Solicitor, for the appellants, *F. T. Hickford* for *Hamilton Clarke*, Benalla.

Solicitors, for the respondent, *Lamrock, Brown & Hall.*

B. L.

H. C. OF A. 1911.

BENALLA CORPORATION *v.* CHERRY.

[HIGH COURT OF AUSTRALIA.]

ALFRED EDWARD SENDALL AND ANOTHER . . . . . } APPELLANTS;

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

AND

KATE MARION CRACE AND OTHERS . APPELLANTS;

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

H. C. OF A. 1911.

SYDNEY, *Aug.* 24, 25.

Griffith C.J. and O'Connor J.

Oct. 6.

Griffith C.J.

Land Tax Assessment Act 1910 (*No.* 22 *of* 1910), *secs.* 25, 33, 62—*Land Tax Regulations* 1911, *reg. No.* 51—*Amendment—Invalidity—Land tax payable by trustee—Tenant for life—Remainderman.*

Sec. 25 of the *Land Tax Assessment Act* 1910 provides that the owner of any freehold estate less than the fee simple shall be deemed to be the owner of the fee simple, to the exclusion of any person entitled in reversion or remainder, and that for the purpose of the assessment of a tenant for life of land, without power to sell, under a settlement made before 1st July 1910, or under the will of a testator who died before that date, the unimproved value of the land shall be calculated upon the basis prescribed by that section. "Tenant for life" includes a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life.