With regard to the second question—the validity of the *Wheat Acquisition Act* 1914—I agree with the judgment of the Court, and adopt what has been said by my brother *Gavan Duffy*.

Appeal allowed. Order of Inter-State Commissioners discharged. Petition dismissed with costs. Action dismissed with costs. Respondents to pay costs of appeal. One set of costs in High Court.

Solicitor, for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for the respondents, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the interveners, *E. J. D. Guinness*, Crown Solicitor for Victoria; *Dibbs, Parker & Parker.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HEWITT . . . . . APPELLANT;
DEFENDANT,

AND

HOLLIDAY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Negligence—User of land without permission of owner—Licensee—Permission of lessee—Erection of dangerous fence.

The plaintiff and other persons had been accustomed to use a track across the defendant's land. The defendant knew of the practice and objected to it, but the lessee of the land permitted it. In order to prevent the use of the track the defendant erected a single wire across one end of it, stretched from one to another of several trees. The plaintiff, who had been accustomed to

H. C. OF A. 1915.

HEWITT v. HOLLIDAY.

use the track, and who did not know of the erection of the wire, while riding a motor cycle and desiring to use the track, without negligence ran into the wire and was injured. A jury having found a verdict for the plaintiff, and the Supreme Court of New South Wales having refused to grant a new trial,

Held, that special leave to appeal to the High Court should not be granted.

Special leave to appeal from the decision of the Supreme Court of New South Wales: *Holliday* v. *Hewitt*, (1915) S.R. (N.S.W.), 257, refused.

APPLICATION on notice for special leave to appeal.

Mary Ann Hewitt was the owner of a house the means of access to which was over her land by a winding drive with trees planted along each side of it at intervals of about 45 feet. She leased the house to Messrs. Campbell and Paterson for a term of years, with a right of user of the drive for themselves and their servants and visitors. She also leased the land on both sides of the drive to Henry Berry, with a reservation to Mrs. Hewitt of a right to enter for certain purposes, including fencing. Along one side of the drive was a fence. Persons going to or coming from the house had, to the knowledge of Mrs. Hewitt and of Berry, been accustomed to deviate from the drive and cross the land leased to Berry instead of following the windings of the drive, and a track had been worn by the traffic. Mrs. Hewitt objected to the deviation, and in order to prevent it caused to be put up a single wire stretched taut from tree to tree at a height of about 4 feet 8 inches along the unfenced side of the drive, having first given notice to the tenants of the house of her intention to do so, and having asked them to warn their servants and visitors. William Meredith Holliday, who had been in the habit of using the deviation on his visits to the house, but who had no knowledge of the erection of the wire, ran into the wire on his motor cycle while attempting to use the deviation for the purpose of going to the house, and was injured. He brought an action in the Supreme Court of New South Wales against Mrs. Hewitt to recover damages for the injuries occasioned to himself and his motor cycle. The jury found that the deviation was used with the permission of Berry, negatived contributory negligence, and found a verdict for the plaintiff for £150. The defendant appealed to the Full Court and moved for a new trial, but the

appeal was dismissed and a new trial refused: *Holliday* v. *Hewitt* (1).

The defendant now applied for special leave to appeal to the High Court from that decision.

Sanders, for the appellant. The plaintiff was a trespasser, and the defendant owed no duty to him: *Benalla Corporation* v. *Cherry* (2); *Grand Trunk Railway Co. of Canada* v. *Barnett* (3). The fact that the defendant knew that persons habitually used the deviation without any permission by her imposed no duty upon her: *Lowery* v. *Walker* (4).

[GRIFFITH C.J. But there was permission on the part of the tenant of the land, so that the plaintiff was not a trespasser.]

Pitt, for the respondent, was not called upon.

Per Curiam. Special leave to appeal will be refused. The applicant must pay the costs of the motion.

Special leave to appeal refused with costs.

Solicitors, for the appellant, *Shipway & Berne*, Sydney, by *Neave & Demaine.*

Solicitor, for the respondent, *A. E. Baker*, Sydney.

B. L.

(1) (1915) S.R. (N.S.W.), 257.
(2) 12 C.L.R., 642.
(3) (1911) A.C., 361.
(4) (1910) 1 K.B., 173; (1911) A.C., 10.