

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF RAILWAYS } APPELLANT;
 (WESTERN AUSTRALIA) }
 DEFENDANT,

AND

DAVIS BROTHERS RESPONDENTS.
 PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
 WESTERN AUSTRALIA.

H. C. OF A. *Practice—High Court—Special leave to appeal—Injury sustained on land subsequently vested in Crown as from earlier date—Public Works Act 1902 (W.A.) (2 Edw. VII. No 47), sec. 97.*

MELBOURNE,

Feb. 21.

Griffith C.J.,
 Barton,
 Isaacs,
 Gavan Duffy
 and Rich J.J.

Sec. 97 of the *Public Works Act 1902* (W.A.) provides that when any railway is authorized to be constructed, after the passing of the special Act authorizing its construction the Governor may at any time, and from time to time, by notice in the *Government Gazette*, take any land required for the railway, and that “(c) The notice, when published in the *Government Gazette*, shall be conclusive evidence that the land therein referred to is from the date named in such notice, not being earlier than the date of the first reading of the special Act in the Legislative Assembly, taken by and vested in His Majesty in fee simple, freed and discharged from all mortgages, charges, claims, estates, and interests of what kind soever, for the use of the railway.”

A railway was constructed, under the authority of an Act passed in 1911, through land of the plaintiffs. On 14th March 1914 a truck loaded with wheat was derailed, and the wheat was thrown out on to the plaintiffs' land. The plaintiffs' horses ate of the wheat, and in consequence died. On 6th November 1914 a notice was, pursuant to sec. 97, published in the *Government Gazette*, purporting to take the land of the plaintiffs on which the wheat was

thrown out as from 16th February 1911. In an action in the Supreme Court of Western Australia by the plaintiffs against the Commissioner of Railways to recover damages in respect of the loss of their horses judgment was given for the plaintiffs, and that judgment was affirmed by the Full Court.

Held, that the case was not one in which special leave to appeal to the High Court should be granted.

Special leave to appeal from the Supreme Court of Western Australia refused.

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APPLICATION for special leave to appeal.

An action was brought in the Supreme Court of Western Australia by Davis Brothers against the Commissioner of Railways to recover damages for wrongfully entering the plaintiffs' land and depositing wheat thereon, and for injury to the plaintiffs' horses caused by eating such wheat, which was alleged to have been negligently guarded by the defendant. It appeared that a certain railway, which was constructed under the authority of the *Tambellup-Ongerup Railway Act 1911*, ran through the farm of the plaintiffs; that on 14th March 1914 a truck loaded with wheat was derailed and the wheat thrown out; that the wheat was then stacked beside the railway line, and that the plaintiffs' horses got at the wheat and died through eating too much of it. By his defence the defendant alleged that after the commencement of the *Tambellup-Ongerup Railway Act 1911* the agents of the Crown were entitled to do such acts and things in respect of the railway and of the land appurtenant thereto as are mentioned in secs. 97 and 99 of the *Public Works Act 1902*; that the railway and the land appurtenant thereto became the property of the Crown as from 16th February 1911 by virtue of a notice of resumption published in the *Government Gazette* on 6th November 1914 and of sec 97 of the *Public Works Act 1902* and of the *Tambellup-Ongerup Railway Act 1911*; and that the railway was declared a district railway under the *Government Railways Amendment Act 1907* by Order in Council dated 9th July 1912 and published in the *Government Gazette* on 19th July 1912. The action was heard by *Burnside J.*, who gave judgment for the plaintiff for £80 10s. From that decision the defendant appealed to the Full Court, but the appeal was dismissed.

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

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Starke, in support of the application. There was no finding of negligence, and it was held that the defendant was responsible apart from negligence altogether. By virtue of the notice published in the *Government Gazette* on 6th November 1914 and sec. 97 of the *Public Works Act* 1902, the land on which the wheat was stacked when it was eaten by the plaintiffs' horses is to be deemed to have been vested in the Crown in fee simple at the time of the injury complained of. The question of law sought to be raised in this Court is whether the result is not to relieve the defendant from responsibility.

[ISAACS J. Such a case as this is not likely to arise again.]

PER CURIAM. We do not think this is a case for special leave. We express no opinion upon the question of law.

Special leave to appeal refused.

Solicitor for the applicant, *F. L. Stow*, Crown Solicitor for Western Australia, by *Lawson and Jardine*.

B. L.