Cons
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[HIGH COURT OF AUSTRALIA.]

THE YANDAMA PASTORAL COMPANY . . APPELLANT;
DEFENDANT,

AND

THE MUNDI MUNDI PASTORAL COMPANY LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 24, 25, 26.

MELBOURNE, *Oct.* 26.

Knox C.J., Isaacs, Higgins and Rich JJ.

Land—Trespass—Pastoral lease—Right to take travelling stock across pastoral lease—Stock Diseases Act 1888 (*S.A.*) (*No.* 443), *sec.* 20*—*Pastoral Act* 1904 (*S.A.*) (*No.* 850), *sec.* 94*—*Pastoral Act* 1893 (*S.A.*) (*No.* 585), *sec.* 37, *Sched. A—Ordinance No.* 8 *of* 1841 (4 *Vict. No.* 8) (*S.A.*), *sec.* 30—*Impounding Act* 1858 (*S.A.*) (*No.* 8 *of* 1858), *sec.* 43—*Impounding Act* 1920 (*S.A.*) (*No.* 1441), *sec.* 2.

Held, by *Knox* C.J., *Higgins* and *Rich* JJ. (*Isaacs* J. dissenting), that neither sec. 20 of the *Stock Diseases Act* 1888 (S.A.) nor sec. 94 of the *Pastoral Act* 1904 (S.A.) confers upon the owner of travelling stock a right to take them across the lands comprised in a pastoral lease.

* Sec. 20 of the *Stock Diseases Act* 1888 (S.A.) provides that "Any person desirous of crossing any run, or lands leased from the Crown, or any Crown lands within any hundred, other than travelling stock reserves, with a flock of sheep, or drove of cattle or horses, shall, before entering upon any such run, leased lands, or Crown lands, give to the proprietor of such run, or leased lands, or, as to the Crown lands within hundreds, to the nearest police constable or Crown lands ranger, not less than twenty-four hours' nor more than seven days' notice in writing of his intention so to enter or cross, and shall in such notice specify the place from which such sheep, cattle, or horses started, and their destination, which shall be by some recognized route, and the number and description of the horses, cattle, or sheep in such drove or flock, and the points and dates at which such person proposes to enter and leave such run, leased lands, or Crown lands which shall be on some recognized route; and the person so entering shall drive or conduct such flock or drove in the direct course of their destination, as specified in such notice, a distance of not less than five statute miles on each day whilst crossing such run, leased lands, or Crown lands, and shall securely close all gates on the line of route;" &c.

Sec. 94 of the *Pastoral Act* 1904 (S.A.) provides that "Any person desirous of entering and crossing any run with

Held, also, by *Knox* C.J., *Higgins* and *Rich* JJ., that in a pastoral lease granted pursuant to the *Pastoral Act* 1893 (S.A.) a reservation to all persons of "the rights of crossing the said lands with travelling stock" does not confer such a right, but only reserves existing rights.

Decision of the Supreme Court of South Australia (*Angas Parsons* J.): *Mundi Mundi Pastoral Co. Ltd.* v. *Yandama Pastoral Co.*, (1924) S.A.S.R. 492, affirmed.

APPEAL from the Supreme Court of South Australia.

The Mundi Mundi Pastoral Co. Ltd. brought an action in the Supreme Court against the Yandama Pastoral Co., in which, by the statement of claim, the plaintiff alleged that it was the lessee of two adjoining pastoral leases in South Australia, which, with certain lands in New South Wales, was known as Mundi Mundi; that the defendant about 7th July 1923 served on the plaintiff a notice to the effect that, being desirous of entering and crossing Mundi Mundi run with cattle on 10th July 1923, the defendant's driver would on the last-mentioned day enter upon the run with 450 cattle, that such entry would be made at the gate on the plaintiff's northern boundary nearest the border fence between South Australia and New South Wales, and that the point of leaving would be the gate nearest that boundary fence on the southern boundary of the run; and that on 10th July 1923 the defendant, by its servants and agents, broke and entered the plaintiff's land with about 450 cattle and broke down the fence on the plaintiff's northern boundary and wrongfully drove the cattle across such land to its southern boundary. The plaintiff claimed a declaration that the defendant

sheep or cattle shall, before entering upon such run, give to the lessee, overseer, or other person in charge of the run not less than twenty-four hours' nor more than seven days' notice in writing of such his desire, and shall in such notice specify the number and description of such sheep or cattle, their proposed destination, and the points, which shall be by gates where runs are fenced, and dates at which such person so proposes to enter and leave such run, . . . and such person shall travel such sheep or cattle a distance of not less than five miles on each day while crossing such run by the most direct track; and if such sheep or cattle are only travelling for feed the owner or person in charge of such stock shall be liable to pay to the lessee, overseer, or person in charge of such run the sum of six pence for every hundred of such sheep or part of one hundred of such sheep and six pence for every twenty of such cattle or part of twenty of such cattle for every day or part of a day that such sheep or cattle may be upon such run . . . : Provided that nothing herein contained shall be so construed as . . . to affect or in any way alter the provisions of section 20 of the *Stock Diseases Act* 1888 as regards Crown lands within hundreds."

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was not entitled to enter or cross or travel stock across that portion of the plaintiff's land which comprised the land abutting on the border fence between South Australia and New South Wales and extending westward to a line drawn from the western side of the gate on the northern boundary of the property nearest to such border fence to the western side of the gate on the southern boundary of the property nearest to such border fence. The plaintiff also claimed £500 damages.

The defendant by its defence relied upon the provisions of the *Stock Diseases Act* 1888 (S.A.) and the *Pastoral Act* 1904 (S.A.) in justification of the alleged trespass, and it counterclaimed for damages for wrongfully obstructing the defendant in the exercise of its right to enter and cross the plaintiff's run with travelling stock, an order in the nature of an injunction restraining the plaintiff from such obstruction, and a declaration that the defendant was entitled to enter and cross the plaintiff's land with travelling stock subject to the defendant observing the provisions of sec. 94 of the *Pastoral Act* 1904 or alternatively of the *Stock Diseases Act* 1888 and the *Pastoral Act* 1904.

The plaintiff subsequently brought an action against the defendant, claiming £1,000 damages for a similar trespass alleged to have been committed by the defendant on 31st July 1923; and the same defence was raised.

Each of the pastoral leases in question, which were granted on 25th November 1902, contained (*inter alia*) the following provisions: —"And reserving to aboriginal inhabitants of the said State and their descendants during the continuance of this lease full and free right of egress and regress into upon and over the said lands and every part thereof and in and to the springs and surface waters thereon and to make and erect such wurlies and other dwellings as the said aboriginal natives have been heretofore accustomed to make and erect and to take and use for food birds and animals *ferœ naturœ* in such manner as they would have been entitled to do if this lease had not been made And reserving to all persons the rights of crossing the said lands with travelling stock subject to the provisions of Act No. 443 of 1888 or any other Act for the time being regulating travelling stock Subject to the right of

His Majesty's subjects to use all and every the roads paths or ways heretofore made and used by them or hereafter to be duly opened and dedicated to the public use for the purpose of passing upon through and over the said lands or any part thereof."

The two actions were heard together by *Angas Parsons* J., who in the first action made a declaration in the terms asked and gave judgment for the plaintiff for £65 with costs, and dismissed the counterclaim with costs, and in the second action gave judgment for the plaintiff for £60 with costs: *Mundi Mundi Pastoral Co. Ltd.* v. *Yandama Pastoral Co.* (1).

From those decisions the defendant now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Ingleby (with him *R. W. Bennett*), for the appellant. The *Pastoral Act* 1904 is a code so far as pastoral leases are concerned. Sec. 94 of that Act gives to the owner of travelling stock a right to take his stock across a run on complying with the provisions of the section as to notice, &c. Sec. 94 abrogates the provisions of sec. 20 of the *Stock Diseases Act* 1888; but, even if it does not, the appellant still had the right to take its cattle across the respondent's run on complying with the provisions of sec. 94, although it might be liable to a penalty if it did not comply with the provisions of sec. 20. The reservation in the respondent's leases of the rights of all persons of crossing the land with travelling stock gives the appellant that right, just as the reservation in favour of aboriginal inhabitants gives them the rights which are reserved to them (see *May* v. *Belleville* (2)).

Cleland K.C. (with him *G. S. Reed*), for the respondent. There is no statutory law in South Australia which gives a person a right to take travelling stock across another person's land except along a recognized stock route. A person travelling with stock must drive them along a recognized stock route from the starting-place to the destination, and he must take the most direct route to that destination. It is only with persons travelling with stock on a

(1) (1924) S.A.S.R. 492.

(2) (1905) 2 Ch. 605.

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recognized stock route that sec. 20 of the *Stock Diseases Act* 1888 and sec. 94 of the *Pastoral Act* 1904 deal. The reservation in the respondent's leases is only of rights which exist apart from the reservation. Any right to take stock across another man's land must be found outside those two sections, which only restrict and regulate that right and do not confer it.

R. W. Bennett, in reply. From the earliest days of South Australia a right to travel stock across Crown lands, whether leased or undisposed of, has been assumed. The right is not expressly given by any statute but has received legislative recognition in many Acts: sec. 20 of the *Stock Diseases Act* 1888 and sec. 94 of the *Pastoral Act* 1904 are examples of that recognition. Sec. 20 is either repealed by sec. 94 or is modified by it to the extent of the inconsistency between them. On its true construction sec. 94 itself confers a right, and at the same time persons availing themselves of that right must comply with the general laws of the State including sec. 20 of the *Stock Diseases Act*. Neither of those sections presupposes the existence of a stock route recognized by the Crown or by residents of the district. The words "the most direct track" mean any course or any defined track whether used by stock or not. On the evidence the track through the respondent's land along which the cattle were driven had long been recognized as a route for travelling stock.

Cur. adv. vult.

Oct. 26.

The following written judgments were delivered :—

KNOX C.J. The respondent, the plaintiff in these actions, sued to recover damages in respect of alleged acts of trespass by the appellant. The actions were tried by *Angas Parsons* J., who held that the trespass alleged was made out and entered judgment for the respondent for £65 in one, and for £60 in the other, action. The appellant, in justification of the acts of trespass complained of, relied on the provisions of the *Pastoral Act* 1904 and the *Stock Diseases Act* 1888; and the substantial question for decision is whether those Acts or either of them conferred on the appellant the right to cross the lands of the respondent with travelling stock.

It was not denied that the lands of the respondent on which the alleged trespass was committed were "a run" within the meaning of the *Pastoral Act* 1904, and were also "a run or lands leased from the Crown" within the meaning of sec. 20 of the *Stock Diseases Act* 1888. The material portion of sec. 20 of the *Stock Diseases Act* is in the words following: "Any person desirous of crossing any run, or lands leased from the Crown . . . with a flock of sheep, or drove of cattle or horses, shall, before entering upon any such run, or leased lands, . . . give to the proprietor of such run, or leased lands, . . . not less than twenty-four hours' nor more than seven days' notice in writing of his intention so to enter or cross, and shall in such notice specify the place from which such sheep, cattle or horses started, and their destination, which shall be by some recognized route, and the number and description of the horses, cattle, or sheep in such drove or flock, and the points and dates at which such person proposes to enter and leave such run or leased lands, . . . which shall be on some recognized route; and the person so entering shall drive or conduct such flock or drove in the direct course of their destination, as specified in such notice, a distance of not less than five statute miles on each day whilst crossing such run, or leased lands, . . . and shall securely close all gates on the line of route; and any person offending against or violating the provisions of this section without reasonable excuse shall, on conviction, be liable to a penalty of not less than two pounds nor more than one hundred pounds."

It is apparent that these words confer no express authority on any person to drive sheep or cattle across land belonging to another, even though such land be a run or land leased from the Crown; but it was argued for the appellant that, on its true construction, the section conferred such an authority by implication. In my opinion, this argument cannot be sustained. In the first place, it must be noticed that the object of the Act as stated in the preamble is "to provide against the introduction and *spreading* of contagious and infectious diseases affecting" live stock, and the provisions of the Act—especially those contained in secs. 4 (II.), (III.), (IV.), 6 (IX.), (XI.), (XIII.), 16, 18, 21, 22 and 24—show that the method adopted for the purpose of effecting one of the objects stated in the

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preamble was by regulating and restricting the movement of live stock from one part of the Province to another.

Having regard to the general purpose of the Act, and to the provisions to which I have referred, I think it is clear that the intention of Parliament in enacting sec. 20 was, not to confer on any person who desired to drive stock across the land of another the right to do so, but rather to prohibit any person who might have that right from exercising it except on the conditions and subject to the restrictions specified. It is well settled that the generality of the words "any person" may be restricted by the subject matter or the context of the statute in which they are found, and may in a proper case be considered as confined to any person belonging to a particular class. No doubt the framer of the section assumed that there were persons in the Province who had the right to drive stock across certain classes of lands although those lands belonged to or were in the possession of another person, and in fact this assumption was correct, for, by sec. 43 of the *Impounding Act* 1858, the main object of which was to provide remedies for trespass by live stock whether on Crown lands or on privately owned lands, it was enacted that, until public lines of road should have been defined and marked out, nothing in the Act should prevent the driving of cattle to market or travelling from one part of the Province to another along customary lines of road or in the immediate vicinity thereof, subject to a proviso that nothing in that section should authorize any person to remove or injure any fence. This provision remained in force until the year 1920, when it was repealed by the *Impounding Act* 1920; and it was therefore in force when the *Stock Diseases Act* 1888 was enacted. By the *Impounding Act* the owner or occupier of land was given statutory remedies for the trespass by stock on his land unless the alleged trespass consisted in the driving of stock to market or travelling them along customary lines of road, and his common law remedy by action in the Supreme Court was expressly preserved. I can find nothing in the *Stock Diseases Act* 1888 which indicates an intention on the part of the Legislature to interfere with either the common law or the statutory right of the owner or occupier of

land to complain of trespasses by cattle thereon. In *Harrod* v. *Worship* (1) *Cockburn* C.J. said: "I have always understood, according to the course adhered to by the Legislature, and according to the canon of construction in cases of this kind, that when the rights of individuals are to be interfered with, it is done by express enactment." *Blackburn* J. said (2):—"I agree that we ought not to suppose that it was intended in this way to do away with the private right of individuals having yards and gardens upon the sides of the haven. I admit that the words of sec. 76 rather appear to apply, as expressed by my brother *Wightman*, to every case of placing things upon the space of ground immediately adjoining the haven so as to obstruct the free and commodious passage through or over the same; but if we were to put that construction upon them it would be to say that, by implication, they would have the effect of interfering with the private rights of the people having land, &c., adjoining the haven." In that case the statute under discussion imposed a penalty on any person placing goods, &c., on any space of ground immediately adjoining the haven so as to obstruct free and commodious passage, and it was held that the provision could only apply to cases when a public right of passage existed independently of the statute. In my opinion, this is a case in which we should apply the rule of construction that it is to be presumed that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by a clear implication; there is here no express grant of the right claimed by the appellant, and I do not think the grant of such a right should be implied having regard to the scope and object of the *Stock Diseases Act*. Similar considerations lead me to the same conclusion with regard to the provisions of sec. 94 of the *Pastoral Act* 1904. In the view I take of the section its intention was to restrict and regulate, not to enlarge, the rights then enjoyed by owners of travelling stock to drive their stock across the runs owned or occupied by other persons, and its provisions afford no ground for the implication of a grant to owners of travelling stock of rights not theretofore enjoyed by them. I think the words of the section show that its object was to afford

(1) (1861) 30 L.J. M.C. 165, at p. 167. (2) (1861) 30 L.J. M.C., at p. 168.

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necessary protection to the owners and occupiers of land across which travelling stock might lawfully be driven. I cannot conceive that, if it had been intended by that section to give stock-owners a general right of driving stock across the runs of other persons, that intention would not have been expressed in unequivocal and unambiguous terms, instead of being left to inference or implication.

The reservations contained in the leases to the respondent do not assist the appellant: their effect is to preserve existing rights (if any) not to confer rights to cross the lands with travelling stock when no such right existed.

For these reasons I am of the opinion that the appellant has failed to establish the grounds of justification set up in the action and that this appeal should be dismissed.

ISAACS J. The learned counsel for the respondent, Mr. *Cleland*, began his argument by saying that it was almost impossible to exaggerate the importance of the point involved in this case. He was speaking of the point that then presented itself in the judgment of *Angas Parsons* J., and was not exceeded in the argument of learned counsel. I hardly know what superlative epithet the learned counsel would have employed with respect to the point that now emerges. The point then in issue may be thus stated: Has the lessee of a pastoral run the right to prevent all travelling stock, however healthy and well driven, from passing across his run for any purpose whatever, unless there already exists upon the run a stock "track" which is called in sec. 20 of the *Stock Diseases Act* 1888 "some recognized route"? There were and are several other points in the case; but the vital point, and the chief point of national importance, then was that which I have stated, since the admitted facts, in my opinion, drove the respondent to that position. I entirely agree with Mr. *Cleland's* observation even as the position then appeared to be. Probably, however, I do not allocate the importance as he would. As I view the matter, the importance of that point, however it be decided, to the lessee of the run to be crossed, guarded as he admittedly is by law both in respect of disease and loss of pasture, is comparatively trifling. The existence of a recognized stock route certainly does not connote starving the

stock that are on it. Secs. 21 and 22 and following sections of the *Stock Diseases Act* 1888 would apply in any event. But the still more serious point, as the case now presents itself, going far beyond the judgment under appeal, is this: Under South Australian law as it stands, has the owner of healthy travelling stock no right whatever under any circumstances to cross a pastoral run without permission of the lessee, even though there be a "recognized route" through the run? Involved in this, though unnecessary to pursue here, is the similar right to cross even Crown lands, for the same considerations touching the later point apply also to Crown lands unleased. The importance of either point is twofold. It concerns directly all pastoralists who desire to move stock either for the purpose of placing them on their runs, in performance it may be of their contractual obligation to the Crown, or of moving them in case of necessity or for marketing them. Especially is this true in the vast territory known as the C district and shown on the plan attached to the Act of 1904. It also concerns, not quite so immediately but very seriously, the supply to the general population of South Australia of one of the prime necessities of life, and, beyond this, it affects in a close sense the welfare and development of South Australia. When, for instance, we observe that, according to the most recent official statistics of South Australia presented to Parliament, that is, for the year 1922-1923, there were in the State 6,305,133 sheep, with a wool production amounting in weight to nearly 55,000,000 lb., and in value to over £4,000,000, and that there were 425,811 cattle, the result of a steady increase since the drought of 1914-1915, our assent is easily compelled to the observation quoted, particularly when it is remembered that the whole population of the State numbers probably about 520,000. If, therefore, lessees of runs nearer than their neighbours to available railway stations or the seacoast or to feed and water in bad seasons have the power lawfully to bar the passage of all sound and healthy travelling stock in the vast territories where there exists no "recognized route," and still more even where there is such a route, it is a very serious outlook for the State of South Australia. It was astonishing to me to hear it argued, even on the narrower basis that *Angas Parsons* J. adopted, that—while in the very act

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of liberalizing the conditions of pastoral settlement in the more distant parts of the State on virgin land, with a view of inducing and encouraging the occupation of the land, and where, of course, no "recognized routes" existed or could so far in the nature of things exist—the Legislature of South Australia had deliberately adopted the suicidal and inconsistent policy of making the passage of healthy travelling stock, not only always more difficult than it already was, but in a vast number of cases impossible. Plan No. 2, which shows the only recognized stock routes in the whole of South Australia, demonstrates this. *Angas Parsons* J., from whose ultimate conclusion I differ, though not without appreciation of the deep consideration and careful analysis he bestowed upon the case, says very truly with reference to the point I am dealing with:—"I am aware that upon this construction, if there is in fact no track across a run, that run cannot be crossed without permission, and it may mean in many cases that owners of stock are dependent on the courtesy of their neighbours to allow them to cross their runs for the purpose of getting stock to market or in travelling them for feed. This is a very serious consideration, but it is a matter for Parliament to deal with." The learned Judge points out that in New South Wales the Legislature has provided for a similar difficulty by means of a Board which has power to grant a road of access. What in New South Wales has been done under an entirely different scheme of land legislation to meet local national necessities is, in my opinion, now effectively done in South Australia under its own system, a system which has gradually developed in its own way and adapted itself to the changing circumstances of the country. Departmental opinion, of course, cannot sway the Court's interpretation of a statute, but it is satisfactory to me in the circumstances to find, from the correspondence in evidence and quoted by the learned primary Judge, that the department entrusted with the administration of the Act and actively engaged in applying its provisions to the actual conditions of the country takes the same view of the effect of the leases it has issued as I do.

The argument travelled over a wide area and covered questions of law and of fact. The principal contest of fact was as to whether the suggested course along the South Australian side of the border

had acquired the status of a "recognized route." In the view I take, and in the view taken by my learned brethren, it is unnecessary to pronounce upon that question, any opinion I might express being both superfluous and negligible. I therefore confine my attention to the construction of the relevant legislative provisions and to the effect of one single feature of the evidence which, in my opinion, on one alternative construction of sec. 94 of the Act of 1904 should determine the appeal in appellant's favour.

Both sides stated their respective contentions in a series of propositions which may, I think, be shortly summarized. The appellant maintained that it had a general legal right to cross the respondent's run subject only to compliance with the requirements stated in sec. 94 of the *Pastoral Act* 1904, that a "recognized route" was not one of those requirements and that "track" there meant "line of travel." The respondent contended that any such right was not general and must be proved in each instance, but, alternatively, if it be general, it is subject to the cumulative requirements of both sec. 20 of the *Stock Diseases Act* 1888 (No. 443) and sec. 94 of the *Pastoral Act* 1904 (No. 850).

I agree with *Angas Parsons* J. that the seriousness of the consequences of a statute is to be avoided not by Courts but by Parliament. But that is so where the Court arrives at a conclusion involving those consequences. Where, however, a statute is so far doubtful or ambiguous that it is reasonably capable of more than one construction, then, as Lord Parker said in *Brunton* v. *Commissioner of Stamp Duties* (1), results are not without materiality in determining which of alternative conclusions should be adopted. Indeed, the test of reasonableness or unreasonableness, of absurdity or plain sense, of justice or injustice, is in case of ambiguity so very familiar that I do not stop to cite authorities. But in *Shannon Realties Ltd.* v. *Ville de St. Michel* (2) Lord *Shaw*, for the Judicial Committee, laid down a further rule which has a strong application to legislation of the nature we are considering. The learned Lord said: "Where the words of a statute are clear they must, of course, be followed; but, in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent

(1) (1913) A.C. 747, at p. 759. (2) (1924) A.C. 185, at p. 192.

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with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system." It is evident that no one could say the legislation is unambiguously in favour of the respondent. That is the least that can be conceded, and so there is abundant room for applying in some measure the test of consequences and of the preferable alternative to the conclusion for which it contends.

Apart from that consideration, however, though still more if it be taken into account, I should construe thus the relevant legislation:—Sec. 94 of Act No. 850 operates as regards sec. 20 of Act No. 443 as follows: (i.) It "alters" the earlier section by substituting in sec. 20 its own corresponding provisions as to crossing "runs" (except so far as relates to any Crown lands within hundreds (see sec. 18 of Act No. 1519 of 1922)); (ii.) it leaves the earlier section otherwise unaltered; (iii.) sec. 20 continues to operate in its "altered" form as to "runs" (except such parts as are Crown lands within hundreds) and in its original form as to other leases and all Crown lands within hundreds. I construe the phrase in sec. 94 "the most direct track" as meaning, in its collocation, that line of travel in the direction of the notified proposed destination which is the most direct, consistently with whatever fences and gates and other obstacles the lessee has erected. The reasons which upon ordinary analysis of these sections lead me to the above conclusions are, for the sake of avoiding repetition, stated later on.

I may observe that, although in view of specific prohibition in various Acts there was apparently no power before sec. 18 of Act No. 1519 of 1922 to *grant* a pastoral lease of land within a hundred, yet, once a pastoral lease was granted of permitted lands, there was and is power to declare some of it a hundred (sec. 5 (*g*) of the *Crown Lands Act* 1915 and prior corresponding law going back to 1903, and the regulations under those Acts), and then, even if not resumed, it would not be eligible for further pastoral leasing until sec. 18 of the Act of 1922 was passed. For those reasons I make the exception in relation to the operation of sec. 20 of Act No. 443 as altered in relation to "runs."

Upon the mere reading and comparison of the Crown Lands

Acts and the two Acts No. 443 and No. 850, as applied to the respondent's lease, I am of opinion that the appellant's view is right. But for the weight of the opinions from which I have the misfortune to differ, I should so hold without believing there was much room for doubt and without reference to more than I find stated on the face of the enactments themselves. It must be admitted that a more direct method of altering sec. 20 of the *Stock Diseases Act* 1888 might have been adopted by the Legislature. Although, therefore, the language of the various Acts when they are read together is sufficiently clear to me, it would be very unsatisfactory in a matter of such overwhelming public concern to rest at that where opinions so widely differ. In the circumstances then, and treating the statutory provisions of sec. 94 of Act No. 850 as ambiguous, it is desirable to approach them as the Parliament of South Australia approached them—that is, with a knowledge of the position of the country including the existing legislation immediately preceding their enactment. In other words, using a familiar expression, I seek the same light as the framers of the document had at the time it was brought into being. When that is ascertained, the meaning which I attach primarily to the words themselves is found, as I think, to be irresistible.

(1) *History of the Pastoral Legislation.*—The relevant history of the pastoral law of the State establishes that *the right of owners of travelling stock to pass*—a right more or less regulated, but basically a right—over Crown lands, including lands let by the Crown for pasturage, is *part of the constant and traditional policy and law of South Australia.* It is a mere truism to say that the pastoral industry was a pioneer industry and is still a staple industry of the State. By some it is to-day considered the most important industry of South Australia. Its earliest home was Holdfast Bay close to Glenelg, quite near to Adelaide. As settlement advanced the pastoral grounds have gradually retreated until they have extended to several hundred miles inland, indeed to the very northern limits of the State, where it joins Queensland and the Northern Territory. In other words, it has been forced to occupy lands which were far removed from populous localities where main roads were constructed and where frequent traffic of all kinds formed for itself convenient ways

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that were well recognized and followed, though not always officially adopted. It has been compelled to utilize regions more remote, sometimes calling for pioneering work, and where the beaten paths of communication had yet to come into existence as a necessary preliminary to recognition in any sense. Townships, hundreds—which are an official mark of closer population,—agriculture, and settlement generally, pressed back the pastoralists' runs, large resumptions being effected as the needs of the Province required. How extensive were these resumptions may be seen at once from Mr. Goyder's celebrated report of 1890, at p. 18. He speaks of the resumption of two and a quarter million acres fringing the then existing hundreds, and says that in the direction of the land resumed a million and a half acres, nearly, were required to meet the selections. Mr. Goyder was the Surveyor-General, and the reliance placed by Parliament upon him and what he said is part of the common knowledge of South Australia. His report was before Parliament when it passed the legislation of 1893. His reference to the " hundreds " has a significance which will be better understood when I state presently the meaning and application of a " hundred."

But it may be said that from first to last the pastoral industry as a whole has received the special care of the Province, as it was called before Federation. Favourable opportunities were given to pastoralists to depasture their stock upon Crown lands, first by licence and then, as more expenditure became necessary and more difficult country had to be occupied, by lease. But even when to some extent the right of pasture was made exclusive, the governing authorities—whether legislative or administrative—never treated the lessee as entitled entirely to exclude the public and especially the owners of travelling stock. The Government never lost sight of the obvious fact that pasture without the means of reaching it or, having reached it, without the means of getting to market or in case of necessity of finding better pasture grounds, would be illusory or worse—in fact disastrous to everybody. This is evident from an almost unbroken course of regulation, administrative and statutory. As early as 1850 (see *Government Gazette* for 7th November 1850, p. 629) it was notified by Governor Young that from the date of the *Gazette* the Regulations of Her Majesty in

Council made under the Imperial *Waste Lands Act* (9 & 10 Vict. c. 104) should have the force of law. Among those regulations was one (sec. (i.)) which enabled the Governor to grant pastoral leases, not exceeding fourteen years in duration, of land outside the hundreds but subject to such conditions as the Governor should think necessary for the protection of the aborigines or "*for securing to the public the right of passing over any part of the said land.*" This right was recognized and respected by sec. 43 of Act No. 8 of 1858 (Impounding Consolidation Act). This must not be misunderstood. With deep respect for the contrary opinions of my learned brothers the Chief Justice and *Higgins* J., who have courteously shown me their judgments, I am unable to regard sec. 43 of the 1858 *Impounding Act* after its enactment as the source of the right now under consideration. Except to emphasize the importance attached by Parliament to the traditional right of moving stock to market and elsewhere for pastoral purposes, the section seems to me to have no relevance. I ought to state my reasons with some particularity. The provisions of sec. 43 of the Act of 1858 were enacted as early as 1847 by No. 3 of that year. It was an Impounding Act and was dated 23rd February 1847, when the Province was in its infancy. It repealed two prior Impounding Acts (4 Vict. No. 8 and 5 Vict. No. 17), and by sec. 28 provided: "And be it enacted that until public lines of road shall have been defined and marked out nothing in this Ordinance contained shall be construed to *prevent* the driving of cattle to market or travelling from one part of the Province to another along customary lines of road or in the immediate vicinity." The *Impounding Act* protected Crown lands as well as private lands, and, unless such a provision as that in sec. 28 were made, in those early days there would have been a trespass and impounding of all travelling stock. The concluding words "or in the immediate vicinity" are of importance. Apparently, those words made it necessary to strengthen the impounding law, because by Act No. 4 of 1856 the Act No. 3 of 1847 was amended by declaring in sec. 15 that "Any person who shall unlawfully remove or take down any rail or slip panel or fencing for the purpose of allowing cattle to trespass on or escape from any enclosed land shall be guilty of a misdemeanour and being convicted thereof shall be liable to a

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penalty" not exceeding £10 or three months' imprisonment with hard labour. But it is plain that in 1856 no fence could be removed even to pass to market. It is also plain, for several reasons, that the Act of 1847 did not give, and was not understood to give, any right to conduct travelling stock over pastoral runs. To begin with, sec. 28 of that Act was no interference with private property. *It was no grant of any right that did not previously exist.* Its language was much further removed from granting a right than is the language of either sec. 20 of the *Stock Diseases Act* 1888 or sec. 94 of the *Pastoral Act* 1904. It was—as was sec. 43 of the later Act—couched in *negative* terms, that is, it declared that the Ordinance did not *prevent*, &c. It did not declare that the entry should not be a trespass, if it were so by common law, but merely that the new amendment of the common law as to impounding, that is, as to the distraint of cattle trespassing, should not apply in the events stated. It did not derogate in any way from any common law right of action, if that otherwise existed. In my opinion, it operated primarily, if not exclusively, in respect of Crown lands (see particularly sec. 8 of Act No. 11 of 1846). At that time and until 1851, grazing rights on the waste lands of the Crown were by licence only under 6 Vict. No. 8 (1842), and a licence gave no title to land (sec. 21) but simply the right to depasture (see Schedule A and sec. 22 of Act No. 11 of 1846). It was only by the Order in Council of 1850 that leasing for depasturing purposes took place. And even so, it is well known that, even after leasing was instituted, sheep runs in South Australia were originally not fenced, but shepherded, and that not until about 1865 were such runs fenced. That is important to bear in mind when reading these early ordinances and statutes.

Now, in 1858 there was passed the consolidating and amending Act (No. 8 of that year) dealing with impounding cattle that were trespassing. For brevity I refer as to the nature of such an Act to *Halsbury's Laws of England*, vol. I., pars. 824 to 836. Trespass for this purpose is essential. But "trespass" is an unauthorized or unjustifiable intrusion upon a person's possession (see *Clerk and Lindsell on Torts*, 7th ed., p. 320). If, however, an entry on another's land is prima facie a trespass, it may be shown to be justified, and,

if so, it is no trespass. Now, sec. 43 is simply a qualification of sec. 39, which says " it shall be lawful for the ranger duly appointed in that behalf to impound any cattle found trespassing upon the waste lands of the Crown, or upon any road within any district," and of sec. 40, saying " if any cattle shall be found trespassing upon any unfenced land after the expiration of three days after notice not to trespass upon any such land," &c., one-fourth of the rate for fenced land may be recovered. Sec. 41 repeats the prohibition as to removal of fences, gates and panels. Sec. 42 prohibits the straying of cattle in streets of towns and villages. Then the office of sec. 43 is, I think, plain. It has no relevance to pastoral leases. Its concluding words, retaining in full force sec. 41, notwithstanding the relaxation by sec. 42, otherwise even as to " vicinity " are quite inconsistent with the grant of a right such as we are considering. It is inconceivable to me that, if the Governor and Legislative Council in 1847 thought they were creating such a right, they would have thought it necessary, or that the Sovereign in Council would in 1850 have thought it necessary, to make the affirmative provisions I have mentioned. The Queen's Order in Council was recognized and recited in Act No. 20 of 1858, that is, later than the *Impounding Act* of that year. It is also strange to me that such a right as we have before us should be left to the implication from the negative terms of an Impounding Act passed *alio intuitu*. It is equally strange that the Legislature and Government of South Australia, if the right depended on sec. 43 of the Act of 1858, should have taken such careful and repeated measures to secure and define the right. It is still more strange to me that, at a moment when its advanced policy of development required all the freedom of movement reasonably possible, the whole vital right should have been abrogated *sub silentio* by the replacement of the *Impounding Act* of 1858 by the modern Act of 1920. I cannot believe that this annihilates at a stroke all the elaborate provisions in the Pastoral Acts as to the covenants and conditions, exceptions and reservations in the leases, and all the traditional usage as to travelling stock. It would be wonderful to me if, not only the Legislature, but also those whose very commercial existence depends on the right, were all the time

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unconscious that it arose and departed under cover of an Impounding Act.

The truth is that sec. 43 is beside the present question. If it had never been enacted and this case had arisen in 1919, the result must have been the same. It no more gave the right to persons with travelling stock mentioned in the lease than it did to the aborigines, the Crown, and other persons to whom rights are thereby reserved. If sec. 43 had never been enacted, a lease, containing a reservation or exception such as exists in this case, would, by force of the Queen's Regulations based on the Imperial Act and by force of subsequent legislation and regulations continuing the same policy, have been sufficient to exclude the charge of trespass, because the intrusion would have been authorized or justified. Sec. 43 was only needed *faute de mieux*. The *Impounding Act* of 1920 is, of course, equally irrelevant. One other reason for this is apparent on the face of sec. 43. That section limits its own operation. It applies, as it says itself, only "until public lines of roads shall have been defined and marked out," and then by its own force its protection can no longer be invoked. No repeal was necessary for this. I should think it was meant to apply distributively. Wherever cattle could go along a public line of road defined and marked out, say near Adelaide, they could not come within the protection of the section quite irrespective of whether 200 or 300 miles off a customary road had to be followed. So, when did the right, if created by the section, expire? Public roads—a vast number of them—had come within the necessary category long before 1920. These considerations lead me to the opinion that the matter must be examined quite apart from the Impounding Acts.

Even in 1858 there were enactments relative to scab in sheep. I may, however, begin with a reference to Act No. 19 of 1859, as the first of a series of enactments parallel or concurrent with the Waste Lands Acts and Crown Lands Acts. Sec. 13 of the Act of 1859 recognized the right of the owner of travelling sheep to pass over pastorally leased land, subject to the right of the occupant to examine the travelling sheep and to certain consequences if the sheep were found to be diseased. In 1863, by Act No. 8, this was amended and sec. 3, which extends to cattle as well as sheep, was,

as *Angas Parsons* J. says, the basis of sec. 20 of the Act of 1888. Nevertheless, subject only to the collateral liability for travelling diseased sheep, the general right of passing them over leased pastoral runs was provided for. In 1865 on 25th May, after the passing of the Acts of South Australia (in 21 & 22 Vict.), local regulations were made by the Governor in Council of which reg. 16 provided that "leases will be granted subject . . . to such conditions as the Government shall think necessary to insert therein for the protection of the aborigines, *for securing to the public the right of passing over any part of the said land*" &c. In 1870, on 18th May, after the passing of Act No. 21 of 1867 and Act No. 17 of 1869-1870, new regulations were made which by reg. 15 repeated the provision. In 1876, on 1st March, new regulations were issued of which reg. 17 again repeated the provision. In 1877 the Crown Lands Acts were consolidated by Act No. 86. Sec. 80 recognized the right of passage of travelling stock, but made a just allowance to the lessee for the pasturage of the stock while crossing his run, and ended by preserving intact sec. 3 of the *Scab Act* 1863. In this way all public advantages and private rights were adjusted.

In 1888 two Acts were passed on the same day, Act No. 443 and Act No. 444. The first was the *Stock Diseases Act*, and provided on a larger scale against the introduction and spread of disease in stock. Sec. 20, which looms so large in this case, recognizes the basic right of passage for travelling stock over "any run, or lands leased from the Crown, or any Crown lands within any hundred." It regulates that right, so as to afford protection against communicating disease. It creates duties on a person who is travelling stock and who is desirous of crossing any of three classes of land. Those duties are (*a*) before entering and (*b*) after entering. (*a*) *Before entering* he had in all cases to give a written notice of intention to enter or cross complying with the following conditions: (1) it had to be given not less than twenty-four hours *nor more than seven days* before entering; (2) it had to specify the place from which the stock *started* and their *destination*; (3) *the course had to be by some recognized route*; (4) the number and description of the stock had to be stated; (5) the points and dates of entry and leaving had to be stated; (6) the run had to be itself on some recognized

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route. (*b*) *After entering* the person entering had to (1) drive or conduct the stock " in the *direct course of their destination, as specified in such notice, a distance of not less than five statute miles* on each day whilst crossing," and (2) securely close all *gates on the line of route.* The penalty for breach of the section without reasonable excuse was £2 to £100, and in default of payment imprisonment with or without hard labour up to six months. Secs. 21 and 22 make provision for the detention and examination of travelling stock reasonably supposed to be diseased. They are deterrent and protective against contamination by disease. Secs. 20, 21 and 22 and some other sections are again an adjustment of public requirements and private rights. The other Act, No. 444, passed the same day, was a new *Crown Lands Act*, which provided (*inter alia*) for pastoral leases (secs. 55 to 93). Sec. 90 repeated the provisions of sec. 80 of the Act of 1877. I would emphasize the reference in sec. 57 to *securing the stocking and development of the country*, because these words record the fixed policy of the Province.

At this point a crisis in the pastoral industry must be noted, because it resulted in a special Act in 1893 designed to encourage and assist those in the remoter localities as well as to relieve the State in respect of taking over and paying for improvements. In passing that Act, Parliament had before it, not merely the unfortunately well known disastrous state of the industry, but also the very specific reports of Mr. Goyder in 1890 and of the Royal Commission in 1891. It was only too well known by the South Australian Parliament how perilously near disaster was the industry and with it the general state of the Province. Pastoralists had been pushed back into the interior, extensive resumptions had been made in the more settled districts, and inducements had been held out and accepted to take up leases in outlying country. But the struggle there was severe. Dry soil, absence of surface water, precarious and scanty rainfalls, want of proper communications with markets, and wild dogs and rabbits were among the contributing causes to the pressing danger of partial extinction in which the pastoral industry then stood. Parliament came to the rescue in 1893. A new departure in pastoral lease legislation was entered on. A special and separate Act, No. 585, was passed on the subject—

maintaining, however, some connection with the *Crown Lands Act* 1888. Three pastoral districts were created, the last class reaching up to the 26th parallel of south latitude, that is, right up to the Northern Territory. Additional opportunities and inducements were offered with respect to the last class, obviously because of the greater natural and commercial difficulties; and this was carried out in the regulations under the Act made on 17th June 1895. Care, however, was taken as before to maintain the right of passage. Sec. 37 of the Act enacted that "every lease shall be in a form containing the covenants, exceptions, reservations, and provisions mentioned in Schedule A to this Act, subject to any modifications or additions stated in the notice opening the lands for leasing required by the Commissioner for giving effect to this Act; and every such lease shall be prepared by the Commissioner, and executed in such manner as may be prescribed." Schedule A (*inter alia*) provides for a covenant "(*k*) not to obstruct or interfere with any public roads, paths, or ways, or the use thereof by any person." Then, in addition to and quite independent of that, it prescribes "in addition to such covenants . . . such exceptions and reservations in favour of . . . the aborigines of the Colony, and *other persons*, necessary or proper for giving effect to any Act or regulation for the time being in force, or not inconsistent therewith . . . as the Commissioner may require." That is an adherence to the traditional policy initiated in 1850. Those provisions are repeated in the regulations. Sec. 90 of the *Crown Lands Act* of 1888 still applied, and so did sec. 20 of the *Stock Diseases Act* of 1888. This was followed by Act No. 712 (1898-1899). The existing classification was abolished and a new system adopted, one characteristic of which was in sec. 2 (II.) (c), "the proximity *and facilities of approach to railway stations, ports, rivers, and markets.*" The special provisions previously enacted as to class C were retained for the substituted classification.

The relief hoped for from the Act of 1893, supplemented by further legislative intervention in 1895 and 1896, failed to materialize. Once more a commission was appointed and it reported in 1898 stressing the adverse circumstances of the industry. In 1901 still another Act. No. 770, was passed. By 1904 it became evident to

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Parliament that the law required to be further liberalized if the continued depression were to be relieved.

This is perhaps the most convenient place to interpose a few words as to "hundreds." In August 1846, by Ordinance No. 11, it was enacted that for the purpose of extending to occupiers of purchased land in South Australia the enjoyment of common pasturage over such Crown lands in their immediate vicinity as were not held under lease or licence, the Crown might by proclamation divide any country or settled portion of the Province into hundreds and regulate the apportionment of pasturage. This was acted on by proclamation in the following October and afterwards. By Act No. 6 of 1861 all proclamations were validated and general executive power taken to proclaim counties and hundreds. That power is continued through various Acts down to Act No. 1199 of 1915, sec. 5 (*g*). The *Pastoral Act* 1893, as well as various Crown Lands Regulations, provided for resumption of leased lands. For instance, regs. 24 (*n*) and 91, in force in 1891 when pastoral leases came under the ordinary Crown lands. This policy is followed, as appears in the Mundi Mundi lease in this case, with a specific proviso as to the Crown's powers where land is "resumed for commonage . . . purposes."

(2) *The Act of* 1904.—We are now face to face with the circumstances present to the mind of Parliament when it fashioned the Act of 1904. That Act took a very distinct step, and has, with several amendments, lasted for twenty-one years as the principal Act on the subject. It repealed entirely so much of the *Crown Lands Act* of 1888 as remained and certain parts of the *Crown Lands Amendment Act* 1890 (No. 502). By that it completed the severance of the subject matter of pastoral runs from the general legislation as to Crown lands, a course reflected in sec. 94. It repealed all the existing Pastoral Acts and set out to consolidate and amend the law on the subject. In effect it was, and as amended still is, a code on the industry. It reached back by sec. 6 to embrace all leases granted since 28th January 1899, when Act No. 712 was passed introducing the express factor of facilities to markets. It constituted a new Board. It retained the characteristic of market facilities (sec. 52). It amended the law as to compensation for

improvements, a highly important matter, and it recognized the wide divergence of pastoral possibilities in the three designated districts A, B and C (sec. 62). Those districts, as can be seen by reference to the map attached to the Act, may be roughly described thus:—District A comprises lands on or close to the seacoast and lands, generally speaking, about thirty miles from a railway. District B consists of a small portion of land near the coast but mainly of other land fully, if not more than, one hundred miles from a railway and, what is important, severed from the railway by district A. District C comprises the rest of the State situated to the north of the settled and agricultural districts. In extent it is an empire, and is, roughly speaking, three times as large as the whole State of Victoria. Many tens of millions of acres, speaking very cautiously, were yet unoccupied by pastoral lessees and further occupation was invited. Parliament even went so far (sec. 106) as to offer special opportunities to anyone who *discovered* pastoral lands adapted for pastoral purposes, as well as to persons who were prepared to take up a lease that had been *abandoned* by reason of wild dogs or other vermin. In many places land had been reserved for water conservation, but over a vast extent of territory there were no such reserves, and could be none. In much of that territory land is waterless (see sec. 107); artesian water alone is possible, and by the *Pastoral Act Further Amendment Act* of 1922 (No. 1519, sec. 14) inducements are held out for the discovery of water. *In probably half the district or more it would in* 1904 *have been ridiculous to talk of recognized stock routes, in the sense of officially recognized and accredited ways over Crown lands, taken up and gazetted as stock routes in the manner shown by plan No.* 2, and then having the quality of public thoroughfares. For a very considerable period that state of things would inevitably and naturally continue. Stock routes are not arbitrary—experience indicates them. Besides, in the northern country, where pastoral lands had in some cases been *unoccupied* for more than three years or had been *abandoned* (see sec. 106), and more particularly in the distant country which it was the solicitude of Parliament to utilize, even a recognized stock route would be often useless. Mr. Kelly, the respondent's manager, in his re-examination says:—"In most cases you would

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find the stock route eaten out from three-quarters to a mile wide—country that has had a bad time. It would be dead in some cases." In the locality of Yandama—or Tilcha—and to the west of it a single holding, as appears by the leases in evidence, may easily be 100 square miles. It may be 233 square miles or 739 square miles, as in the case of Boolcoomata just west of Mundi Mundi, or more, at the discretion of the authorities. One company, it appears, holds 3,000 square miles. It is manifest that it would have been fatal to restrict access with stock to routes officially recognized either for the purpose of stocking up, including compulsory stocking up, or for saving starving stock, or in order to conduct cattle or sheep to a South Australian market. Since 1888 the whole aspect of the pastoral industry, both in regard to its own inherent position and in relation to the general settlement of the country, had manifestly materially altered. Sec. 106 is in itself cogent evidence of that, though the fact was and is as well known as the existence of the State itself. When, therefore, sec. 94 of the Act of 1904 is read by the light that the South Australian Parliament had when it was passed, it appears to me the last shred of difficulty disappears.

Before analyzing the section, a much debated question should be referred to, namely, the *nature of the right to sue*, which the owner of travelling stock has in the event of his substantive right being infringed. The Act provides for a statutory form of lease (sec. 47) to contain (*inter alia*) the exceptions and reservations mentioned in the Third Schedule. That Schedule requires covenant (*h*) " not to obstruct or interfere with any public roads, paths, or ways, or the use thereof by any person." That " covenant " is, I agree, enforceable as such only by the Crown. But the Act requires, " in addition to such covenants," that " (*q*) such leases shall . . . contain all such exceptions and reservations *in favour of* the Crown," certain public authorities, the aborigines, " and *other persons*, necessary or proper for giving effect to any Act or regulation for the time being in force, or not inconsistent therewith, as may be prescribed, or *as the Commissioner may require.*" The respondent's lease, which was issued in 1902, and, therefore, by force of sec. 6 is within the scope of the Act, contains the following : " And reserving *to all persons the rights of crossing the said lands with travelling stock* subject to the provisions

of Act No. 443 of 1888 or any other Act for the time being regulating travelling stock." The word "rights" in that clause is in itself neither more nor less appropriate to the *Impounding Act* than it is to the lease regarded as the source of origin. The reservation in the lease is, by force of sec. 47 of the Act of 1904, of statutory force, and the "right" or "rights," which may vary with circumstances, of persons desiring to cross the leased lands with travelling stock rest upon the provision made *in their favour* by the statute of 1904. In that reservation, it will be noticed, there is no reference whatever to any *Impounding Act*. If that was what was meant, the omission is peculiar, particularly in view of the specific mention of other Acts. If "rights" meant "such rights as already exist by law," there would have been no necessity to add "subject to," &c., because the "rights" would *ex vi termini* be measured by the totality of relevant legislation. The clause of reservation is strictly an express limitation of whatever exclusiveness of the lessee's right of pasturage would otherwise connote. It prevents the lessee from treating the travelling stock-owner crossing the run with stock in conformity with the reservation as a trespasser. The right does not depend upon the power or will of the Crown or of the Attorney-General to interpose by enforcing a contractual obligation. The Legislature has not made it the subject of "covenant" or in any way of contract. It is expressly taken out of the contract as a basis of *assumpsit* and made a *jus in re*. In my opinion the Act itself imposes on every lessee who accepts a lease with a provision such as I am dealing with here the duty or obligation towards the owner of travelling stock of permitting the passage of the travelling stock, provided it is in conformity with the provision referred to. That attracts a well-known broad common law principle exemplified in such cases as *Groves* v. *Lord Wimborne* (1) and *Butler* v. *Fife Coal Co.* (2) and applicable to the varied circumstances of a progressive community. The right being given subject to relevant legislation, we have to read that legislation, not to find the source of the right, but to ascertain its limitations.

It was contended for the respondent that the word "or" in the relevant reservation by the lease—namely, "subject to the provisions

(1) (1898) 2 Q.B. 402. (2) (1912) A.C. 149, at p. 165.

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of Act No. 443 of 1888 *or* any other Act for the time being regulating travelling stock"—means "and." I do not think it is at all material whether that is so or not. Every Act regulating travelling stock speaks for itself and carries its own force, and, even if there were no express limitation of the right in the lease itself but simply the bare unqualified right, whatever Parliament has said by way of regulating the right must receive full effect. Compare the provisions in the lease as to returns and as to applying for relief from forfeiture. It comes to a mere question of the true effect of sec. 94 of Act No. 850 of 1904. Reading sec. 94, then, as dealing with the case of a person desiring to cross a "run"—and only a "run"—with travelling stock and having a right qualified by relevant legislation to cross the run, it appears to me transparently plain that the Legislature set itself to rewrite the conditions of crossing so as to conform to the necessities of the time and the problem of the future. In face of the known circumstances, I am wholly unable to attribute to Parliament the intention to frustrate its own main objects of relieving existing pastoral lessees struggling in difficult country and of encouraging further development. If the view pressed by respondent is correct, namely, that sec. 94, not merely left the conditions of sec. 20 of 1888 standing as they were (except, perhaps, in extending the time for forty-eight hours), but also created *additional obstacles* in the way of travelling stock, then Parliament was indeed taking a devious course. If the words were so plain as to coerce me to take that view, I should have to confess the result; as they are not, I decline to give them the destructive effect contended for. To begin with, it is plain, on mere inspection, that Parliament takes up the subject matter of "travelling stock" as a special object of consideration, gives it a distinctive heading and places it in a separate part—Part IX.—although consisting of but the one section. That one section, however, is significantly phrased. It is framed in a way that purports on its face to be complete in itself with respect to the circumstances dealt with. Contained in the latest Act on the subject up to that time, it seems to me that, unless the owner of travelling stock could, the day after the Act was passed, have relied on sec. 94 as setting down all the necessary conditions of his entering

and crossing a run with normal stock, so as to avoid criminal liability, it would be very like a trap.

In enumerating the conditions Parliament *eliminated all reference to a "route" whether "recognized" or not.* The very word "route," occurring three times in sec. 20 of 1888, was conspicuously avoided. The necessity created by sec. 20 of specifying the "recognized route" by which the stock had travelled or were travelling all the way from "the place from which" they "started" on their way to their "destination" was omitted. The condition that the "run" is to be on "some recognized route," which means on the same recognized route, is also omitted. With that necessarily goes also the requirement to "securely close all gates on the line of route." "Gates" are expressly mentioned in sec. 94 as points of entry and leaving where the run is fenced; so that they were certainly present to the mind of the Legislature. If it were desired to make the closing of gates an absolute obligation and the breach of the obligation punishable, even though indirectly, by imprisonment for six months with hard labour, it would have been easy to add the requisite words when *ex hypothesi* so much was made redundant. In any case the omission of the matter cannot outbalance so many weighty considerations to the contrary.

Besides omissions, however, there are positive alterations. Instead of requiring a rigid adherence to the dates mentioned in the notice for entering or leaving the run, *a delay of forty-eight hours is provided for.* Instead of "the direct course of their destination, as specified in such notice"—which means "pursuing the recognized route" described in the notice—there is substituted simply "*the most direct track.*" So far as protection to the lessee is concerned, consistently with crossing at all, this might in some cases be much more effectively secured by requiring "the *most* direct track" instead of possibly a circuitous "recognized route." The respondent contends that the travelling stock must not merely under sec. 20 of Act No. 443 keep to the "recognized route" specified in the notice, but must also under sec. 94 of Act No. 850 follow "the most direct track" by keeping to the most direct recognized route on the run. In addition to the other reasons already stated militating against this construction, there is the extreme

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improbability, almost amounting to impossibility, of there being two or more distinct recognized routes converging at the point of entry upon the run. And, assuming there were two such routes, it would be altogether too much to imagine they both led to the same destination. "Recognized stock routes" are rare enough; they do not run in couples to the same destination. Assuming, then, the stock have just entered the run and two such routes converge and directly afterwards or at any point on the run diverge, which is the stock-owner to follow? The respondent says "the most direct" of the two tracks. To what does the word "direct" refer? Does it refer to the stock-owner's destination, or to the distance physically necessary to cross the run? Indisputably I should say to the latter. The object is to get the travelling stock off the run as soon as reasonably possible. But if that be so, the respondent's construction is, or may be, impossible. By sec. 20 of 1888 the run must be crossed by the stock "in the direct course of their destination, as specified in such notice." But, by sec. 94, that course must *ex hypothesi* be departed from, if some other "recognized route" going towards a totally different destination affords a shorter cut across the run. If, for instance, the destination route going south happens in the course of some miles to be half a mile longer than the rival route leading due west, the unfortunate stock-owner must, it is said, take the westerly route, and yet, by some process of reasoning which I cannot follow, adhere to sec. 20 by continuing in the direct course specified in the notice. That repugnancy is the necessary outcome of the argument for the respondent. The phrase "by the most direct track," in my opinion, is capable of much simpler translation. "Track" there, first of all, does not mean the discarded term "recognized route." Nor does it mean a visible mark made on the ground by some previous traffic, possibly a day old. If it does, it would be literally satisfied by a "track" in that sense of any kind, of any width, for any purpose, made at any time. It might be a track made by stock passing by permission, or even by the lessee's own stock. It might be a cattle track or a goat track, or a camel track, or a wheel track, or a track made by foot passengers, or any visible track made for any purpose and having no necessary relation to travelling stock

What possible motive can be suggested for stipulating for such a track? And where is there authority for departing from the letter of the law so as to attract criminal consequences (*The Gauntlet* (1))?

Again, the phrase "the most direct track" assumes *in all cases a choice of "tracks."* If there is only one possible track, there is no meaning in the phrase. If there is no visible track, the parliamentary phrase seems quite futile on the suggested interpretation. It is not futile, however: it assumes in all cases that after entry the run can be crossed in a variety of directions between gates and fences, but that one of those directions is "the most direct track." The true meaning of the expression does not really seem to me to be attended with serious difficulty. It was laid down in *The Lion* (2) that "the meaning of particular words in an Act of Parliament, to use the words of *Abbott* C.J. in *R.* v. *Hall* (3), 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as *in the subject or occasion on which they are used.*'" Applying that principle and aided by the considerations I have stated, I am of opinion that the following meaning of the word "track" as set out in the *Oxford Dictionary*, vol. x., p. 216, is the appropriate one here. It reads thus: "4. A line of travel, passage, or motion; the actual course or route followed (which need not be any visible path, or leave any traces, as the path of a ship, a bird in the air, a comet)." "The most direct track," then, in sec. 94, is nothing more than what I have said earlier as to its meaning. The stock-owner must not interfere with the lessee's right of pasturage more than is reasonably necessary for the desired passage to the specified destination; he must proceed without loitering—which is provided by the statutory minimum rate of travel—and he, avoiding unnecessary circuity, must proceed by the shortest line in the circumstances. That is, he must, as to *direction*, travel in the most direct line to reach his proposed destination that the lessee's arrangement of the run permits. As to the *rate* of travel, it is a minimum of five miles a day—that is, as to sheep, somewhat less than Patterson's "law of the Overland that all the West obey.

(1) (1872) L.R. 4 P.C. 184, at p. 191. (2) (1869) L.R. 2 P.C. 525, at p. 530.
(3) (1822) 1 B. & C. 123, at p. 136.

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A man must cover with travelling sheep a six mile stage each day." Cattle probably usually travel twice the distance or more, but all travelling stock have the same statutory minimum originally fixed for sheep.

The construction I have given to the controverted phrase is strongly borne out by what follows. Down to this point the Legislature has dealt with the conditions of *entering and leaving* a run with normal stock, and without differentiating as to the object of travelling them. But there is added—it is an amended form of sec. 90 of Act No. 444—that if the stock are " only travelling for feed " the stock-owner must pay a prescribed rate per day for the pasture. If, therefore, the purpose is to stock up a distant run—and it must be remembered that the Third Schedule of the Act makes *stocking compulsory*—or to proceed to market, no charge whatever is made. If pasture *only* is sought, the charge is made. I have said this addition is an amendment of sec. 90 of Act No. 444. The amendment itself is significant. Sec. 90 was not specially directed to " travelling stock." It included all " sheep or cattle . . . on any land included in any pastoral lease without the consent of the pastoral lessee thereof." They may not have been travelling stock with a " proposed destination" ; they may have strayed on to the leased property. To come within sec. 94 of Act No. 850 the stock must be " travelling stock " with a proposed destination, which helps to indicate that the Legislature was making a complete statement on the subject of normal travelling stock in relation to runs.

Parliament, however, was not merely restating the conditions of entering and crossing runs with travelling stock. It was restating them, and, judging by the language of the proviso, was doing so by way of *alteration of sec.* 20 *of Act No.* 443 *of* 1888, so as to maintain a complete and consistent enactment on the subject of travelling stock in relation to various classes of land. The portion of sec. 94 relating to *payment* for cattle is not a condition of entering or crossing the land ; the provision for seizure upon the land which appeared in sec. 90 of Act No. 444 has been abandoned, and an action for debt is substituted. The way in which Parliament effected the amendment of sec. 20 of Act No. 443 of 1888 appears

from the proviso to sec. 94 of Act No. 850 of 1904 and later legislation. The proviso, which I divide by numerals, runs as follows: "Provided that nothing herein contained shall be so construed" (1) "as to deprive any lessee of any other remedy he may have in respect of any offence against or violation of this section, nor" (2) "to *affect* or in any way *alter* the *provisions of section* 20 of the *Stock Diseases Act* 1888 *as regards Crown lands within hundreds.*" The first part of the proviso presents no difficulty. It guards against any supposition that the express mention of a sanction in respect of one portion of the provisions of the section implies freedom from all sanction for disregard of any other portion. The second part, however, is a storm centre in this appeal. The respondent contends that it means absolutely nothing as regards "runs," and even as to "Crown lands within hundreds" performs a work of supererogation. The appellant maintains that it has the effect of substituting in respect of runs the provisions of sec. 94 for the corresponding provisions of sec. 20 of Act No. 443. I am distinctly of opinion that the Legislature in sec. 94 has entered the field of "travelling stock" in relation to "runs," and did thereby "affect" and "alter" (using its own expressions) sec. 20 of 1888.

If any sensible meaning whatever is to be given to the second part of the proviso to sec. 94, it must be that Parliament intended by the language employed (1) that as to "runs" the *provisions* of sec. 20 of Act No. 443 *were* to be *affected* and *altered* so as to be in accordance with the provisions of sec. 94, and (2) that as regards "Crown lands within hundreds" sec. 20 of Act No. 443 should stand as it was, that is, *not altered.* The proviso may not be perfect, but so much is clear to me, for otherwise the second part of the proviso is meaningless, because sec. 94 itself—apart from the proviso—contains no word touching "Crown lands within hundreds" outside "runs," and the second part of the proviso not only includes all Crown lands within hundreds whether part of a run or not, but expressly negatives any *alteration of sec.* 20 *of Act No.* 443 *of* 1888 in respect of them. What is the legal effect of *altering* sec. 20 in this way? It is this, in my opinion, that the owner of travelling stock must frame his notice and shape his conduct according to the legal character of the place he intends to cross.

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If it is a " run " (and not Crown lands within a hundred), he must give the notice in the terms which sec. 94 has *incorporated* into sec. 20 as *the* only conditions to be observed in respect of crossing a run. If it is other leased land or is Crown land within a hundred, that is, where roads official or actual may be supposed ordinarily to exist, he must give his notice in the terms originally stated in sec. 20 of Act No. 443 of 1888. In that way, and *in that way only*, is there a penalty for disregard of the statutory requirements. In that way, and *in that way only*, if there be a penalty anywhere imposed for disobedience of sec. 94, would the owner of stock have the benefit of the " reasonable excuse " mentioned in sec. 20. Reading the two sections as the respondent reads them, either there is no penalty in respect of what it calls the added conditions or else the penalties are both different and must be differently proceeded for. A glance at the " legal proceedings " parts of the two Acts will show this.

The construction I have placed upon the combined legislation is strongly supported by sec. 5 of Act No. 1329 of 1918, which treats sec. 20 of Act No. 443 as the only section creating the offence of not giving the notice. If that construction be wrong, then the penalty still stands for not complying with sec. 20 as originally framed, notwithstanding the relief by way of extension. If, however, it be admitted that the requirements of sec. 20 are modified *pro tanto*, it becomes a question, not of mere verbal amendment here and there in respect of runs, but of a restatement of the scheme of appropriate conditions in respect of runs to meet the newer circumstances of the country.

There is one further circumstance, small perhaps in itself, but in cumulative effect not without its significance, and pointing in the same direction. To whom may the notice under sec. 20 be given ? Unaltered—to one of at least four persons, namely, (1) the lessee himself, (2) his known agent, probably in Adelaide or elsewhere away from the station, (3) his overseer, and (4) some person in charge of the land. Under sec. 94 it must be given to (1) the lessee or (2) his overseer or (3) other person in charge of the run. Notice to a " known agent " otherwise will not do. This introduces an additional reason for not construing the two

sections as simply cumulative, apart, perhaps, from the forty-eight hours extension.

3. *The Most Direct Track.*—I have stated my opinion as to the meaning of the expression "the most direct track." Assuming that to be wrong and that it means an actual visible track of some sort short of a recognized route, how does this case stand? I am more concerned with the general effect of the decision than with the result of this particular case. The parties here are what I should regard as representative parties. The appellant represents the interests of owners of travelling cattle, and incidentally those of the general population. No words can picture the position more graphically than those of Inspector Johnston in cross-examination with reference to a man finding himself with stock at that northern gate of Mundi Mundi. The respondent represents the private interests of lessees who desire to prevent at will the passage of stock to and fro in South Australia, except in the comparatively limited area of such stock routes as are shown on plan 2. The development of South Australia, according to the respondent's view, depends on what *Angas Parsons* J. terms "tolerance." In that aspect I deal with this branch of the case. It is, as I view the evidence, clearly established that there is in fact a "track" running down the eastern side of Mundi Mundi on the South Australian side of the border. That is shown by several witnesses. Mr. Kelly, the respondent's manager, says so both in cross-examination and in re-examination. It is according to him 9 to 15 feet from the fence and is 7 to 8 feet wide, the width of an ordinary motor-car track or cart track. It is the only track through Mundi Mundi in South Australia. Tracks, even those made by travelling cattle, are not always permanently marked on the ground. They are like stock routes in this respect. Mr. Gemmell in cross-examination makes it perfectly clear that a track open in good seasons may not be open even in winter in a bad season. Its visibility as a track may disappear entirely and require to be re-established. How could the Legislature possibly mean to limit starving stock, for instance, to an invisible or, if visible at all, a bare track without feed? If, however, "track" while short of a "recognized route" (a position not contended for by the respondent) means some actually apparent prior track on

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the ground, then it is abundantly established by the evidence in this case; and for the general welfare so much at least should be conceded. Literalism cannot deny this conclusion.

In my opinion this appeal should be allowed both as to the claim and the counterclaim upon the basis above stated.

HIGGINS J. I am of opinion that this appeal should be dismissed. As the case was presented to us, and to the learned primary Judge, it was certainly very puzzling to find that neither sec. 20 of the *Stock Diseases Act* 1888 nor sec. 94 of the *Pastoral Act* of 1904 purported to give expressly any right to travel stock to market, &c., across land held by others. Sec. 20 of the *Stock Diseases Act* begins with the words "Any person *desirous* of crossing any run"; and sec. 94 begins with the words "Any person *desirous* of entering and crossing any run"; and one would naturally expect a provision for giving effect to the desire—an empowering provision. But the words which follow give no express power or right; they impose *duties* as to notice, route, rate of travel, &c.—restrictions on some existing right of the kind; and the defendant had to urge that a right was given by implication. It turns out, however, that there was no need of such an implication; that at the time of these Acts being passed an express right had been given to travel stock to market, &c., over the lands occupied by other people, and that this right had its root in Acts, Ordinances and Regulations of the earliest days of this Province. Personally, I was led to inquire into the matter by a reference made by *Angas Parsons* J. to an old Ordinance, No. 8 of 1841, sec. 30, as to impounding: "And be it further enacted that until public lines of road shall have been further defined and marked out nothing in this Act contained shall be construed to prevent the driving of cattle horses sheep or other stock to market [or ?] travelling from one part of the Province to another along customary lines of road or in the immediate vicinity thereof."

This section, I found, was in substance re-enacted in sec. 43 of the *Impounding Act* No. 8 Vict. of 1858 (and see Ordinance No. 3 of 1847, which repeals the Ordinance of 1841). This sec. 43 recognizes the right as in 1858 subsisting, and it effectually excludes from the

impounding provisions of the Act stock which is travelling as described. Sec. 43 shows that even in 1858 need had been felt for further restriction of the right, because, as I suppose, of the increasing settlement; for it adds to the Ordinance of 1841 and the Ordinance of 1847 the words: "Provided that nothing in this clause shall authorize any person to remove or injure any fence." But the Act of 1858 was expressly repealed by the *Impounding Act* 1920, which contains no provision similar to sec. 43; and it cannot be said that there is now any such legislative recognition of the right as now subsisting as there was in 1841 or 1847 or in 1858. We are indebted to the industrious research of my brother *Isaacs* for some of the earlier history of this right. It appears that by the Imperial Act 9 & 10 Vict. c. 104 the Governor was enabled to grant pastoral leases subject to such conditions as the Governor should think necessary for the protection of the aborigines or "for securing to the public the right of passing over any part of the said land." But this is past history. It is not contended that any of these Acts, Ordinances or Regulations still remain in force. For instance, under sec. 24 of the Act No. 21 of 1867 the regulations made under the authority of the *Waste Lands Act*, No. 5 of 1857, ceased to have any effect so far as concerned the leasing for pastoral purposes of any of the waste lands of the Crown included in any of the districts A, B or C. The right to which the *Stock Diseases Act* of 1888 and the *Pastoral Act* of 1904 attached restrictions and safeguards has gone. It was, no doubt, appropriate to the early days of this huge Province, with its then very scanty population; but the Legislature, after trying restrictions for a long time, has seen fit to let the right lapse without re-enactment. The fact appears to be incontrovertible that at the time of this enactment of the Acts of 1888 and 1904 on which the appellant relies, there was a statutory right—a right under statutory regulations, a right recognized by statutes—to travel stock over other persons' holdings, and that that right had come to an end before 1923, the year of the trespass alleged.

If this view be accepted—that the right has ceased—there is no need for us to consider for the purposes of this case the precise interrelation of sec. 20 of the *Stock Diseases Act* and sec. 94 of the *Pastoral Act*. Sec. 20 imposed certain duties on persons travelling

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stock, for the purpose of preventing scab and other diseases. It is followed by provisions enabling the landholder to detain stock for examination by an inspector (sec. 21); and for incidental matters (secs. 22, 23, &c.). Sec. 94 imposed duties on such persons, in favour of Crown leaseholders—not for the prevention of diseases. The word "run" is used; but "run" is defined as "the land comprised in any lease under this Act"—that is, any pastoral lease granted since 28th January 1899 (secs. 6 and 7). Sec. 20 applies not only to a run, but to Crown lands within any hundred (that is to say, in settled districts); and probably the Legislature thought it better, in framing the Act of 1904, not to interfere with the provisions of the Act of 1888, which was for a different purpose.

The lease of the land in question—pastoral lease No. 878—puts the position in the true light. It was issued in 1902, before the *Pastoral Act* 1904, and therefore it does not refer to that Act specifically in the words of reservation as to travelling stock, but it was made subject to that Act (sec. 6). The form of the lease as prescribed appears in the Third Schedule (see sec. 47). The lessee was to have *possession* of the run; for it is prescribed that the lease is to contain a condition that the lessee shall not be entitled to "possession" until he has paid the first year's rent, &c. Even in the case of the Crown and of the Pastoral Board, the right of entry on the land is strictly limited—(*k*), (*l*) and (*m*). The lessee is to covenant, as he covenants here, not to obstruct or interfere with any public roads, paths or ways, or the use thereof by any person—(*h*). According to (*q*) such leases shall contain all such exceptions and reservations in favour of the Crown and other authorities, the aborigines of the State, and other persons, necessary or proper for giving effect to any Act or regulation *for the time being in force,* or not inconsistent therewith, as may be prescribed, or as the Commissioner may require. In this lease, after a reservation in favour of the aborigines, there appears this "reservation" (I assume that it was required by the Commissioner): "And reserving to all persons the *rights* of crossing the said lands with travelling stock *subject* to the provisions of Act No. 443 of 1888" (the *Stock Diseases Act*) "or any other Act for the time being *regulating* travelling stock."

What is "reserved" is the "rights," in the plural—whatever rights persons travelling stock had or should have from time to time. The words are obviously not meant to create a new right. It is to be noticed that the *Stock Diseases Act* is not treated as giving a right, but as limiting, regulating the rights. Then follows in the lease a limitation of the grant (it is not called a reservation): "Subject to the *right* of His Majesty's subjects to use all and every the roads paths or ways heretofore *made and used* by them or hereafter to be duly opened and dedicated to the public use for the purpose of passing upon through and over the said lands or any part thereof." There is no reference here to travelling stock. The land was to be subject to the public right—the existing public right; and the right of the public is to use public roads, highways. I take "roads" to mean public roads (see per *Bramwell* B. in *Curtis* v. *Embery* (1); per *Halsbury* L.C. in *Caledonian Railway Co.* v. *Turcan* (2)); but as there might be some so-called public roads that are roads only on paper or parchment, the clause applies to roads "made and used" only. As to future roads, they must be "duly opened" as well as dedicated.

But even if "roads" does not mean public roads, it is not alleged, nor is it the fact, that the alleged stock route was in any sense "made" as well as used. The following clause shows what "made" refers to; it gives power to the Governor, and all persons authorized by him, to come and go with horses, carts, &c., "for the purpose of laying out and *making fit for* and devoting to the public use any new and additional roads ways and paths."

RICH J. In my opinion *Angas Parsons* J. arrived at the right conclusion. The appellant founded its right to travel stock on the respondent's run upon sec. 20 of the *Stock Diseases Act* 1888 and sec. 94 of the *Pastoral Act* 1904 and the reservation contained in the lease. The reservation in effect provides that if persons had any rights of crossing with travelling stock those rights were subject to the controlling provisions of the Act of 1888. As to the Acts, neither of them confers such a right either in express words or by plain implication. The provisions in question control without

(1) (1872) L.R. 7 Ex. 369, at p. 372. (2) (1898) 67 L.J. P.C. 69, at p. 71.

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empowering the transit of stock. We have not been referred to any Ordinance or Act of South Australia providing for such a right, unless it can be said, which I doubt, that sec. 43 of the *Impounding Act* No. 8 Vict. of 1858 conferred the right. However this may be, this Act was repealed in 1920 and with it the right (if any) given by that Act.

As the appellant has not succeeded in showing by any enabling provision that the right claimed existed at the date of the trespass, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Ingleby & Wallman.*

Solicitors for the respondent, *McLachlan, Reed & Griffiths.*

B. L.

Cons *Commonwealth v Northern Land Council* (1991) 103 ALR 267

[HIGH COURT OF AUSTRALIA.]

GRIFFIN . . . . . PLAINTIFF;

AGAINST

THE STATE OF SOUTH AUSTRALIA . . DEFENDANT.

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MELBOURNE, *June* 1; *Oct.* 12-14, 29.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Practice—High Court—Discovery—Inspection of documents—Action in High Court to which State is party—State papers—Claim of privilege—Opinion of Minister—Conclusiveness—Inspection by Court—Rules of the High Court 1911, *Part I., Order XXIX., r.* 17.

Held, by *Knox* C.J., *Isaacs, Higgins* and *Rich* JJ., that where, in an action in the High Court to which a State is a party, the State objects to produce for inspection documents which are in fact State papers, the rule is that a statement by the Attorney-General for that State that their production for inspection would be prejudicial to the public interests is conclusive and an answer to an application for an order for inspection.