# REPORTS OF CASES

DETERMINED IN THE

# HIGH COURT OF AUSTRALIA

1926-1927.

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[HIGH COURT OF AUSTRALIA.]

ROBINSON & VINCENT LIMITED . . . APPELLANT;
PLAINTIFF,

AND

RICE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 15, 16; *May* 7.

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

*Land—Trespass—Right to take travelling stock across land—Road—Road ordinarily used for three years by public—Objection by owner—Pastures Protection Act* 1912 (*N.S.W.*) (*No.* 35 *of* 1912), *secs.* 4, 107 (1)—*Pastures Protection* (*Amendment*) *Act* 1918 (*N.S.W.*) (*No.* 49 *of* 1918), *sec.* 4 (XXIV.).

In an action in the Supreme Court of New South Wales for trespass to land in that State by driving stock over it, the defendant pleaded a justification under sec. 107 (1) of the *Pastures Protection Act* 1912 (N.S.W.), as amended by sec. 4 of the *Pastures Protection* (*Amendment*) *Act* 1918, alleging that the track over which he drove the cattle had been ordinarily used by the public for upwards of three years. The jury having found a verdict for the plaintiff, the Full Court ordered a new trial on the ground that the jury had wrongly been directed that in order for the defendant to succeed the user by the public must be found to have been without objection by the owner.

*Held*, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that, as there was no evidence upon which a jury could reasonably find that the track had been

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ordinarily used by the public for at least three years, the jury should have been directed to find a verdict for the plaintiff, and therefore that a new trial should not be ordered even if there was a misdirection.

*Per Isaacs* and *Higgins* JJ. : The definition in sec. 4 of the *Pastures Protection Act* 1912 of a " road " as " any road which has been ordinarily used for three years at least by the public " is satisfied without proof that the user has been without objection by the owner.

*Per Higgins* J. : Sec. 107 of the *Pastures Protection Act* 1912 does not give a new right to an owner of travelling stock, but imposes a restriction upon him.

Decision of the Supreme Court of New South Wales (Full Court) : *Robinson & Vincent* v. *Rice*, (1925) 25 S.R. (N.S.W.) 436, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Robinson & Vincent Ltd. against John Rice, in which the plaintiff alleged that on 20th August 1924 the defendant by his servants and agents broke and entered certain lands of the plaintiff being certain Western Lands leases situate at Toorale, near Bourke, in New South Wales and depastured the same with cattle and horses and damaged, removed and destroyed the plaintiff's gates, fences, water dams, tanks, sub-artesian and artesian bores and drains. The plaintiff claimed £1,000 damages. By his third plea the defendant alleged that " through all of the said lands there existed a track which had been ordinarily used by the public as a way for upwards of three years before the alleged grievances " and " was a road within the meaning of the *Pastures Protection Act* 1912 and the Acts amending the same And the defendant having obtained a permit under the provisions of the *Pastures Protection Act* 1912 and the Acts amending the same to travel certain stock from Bourke to a certain destination in the said permit named gave the same into the charge of a certain drover And the said drover having observed all the requirements of the said Acts and the regulations made thereunder took the said cattle for the purpose of reaching the said destination along the said track through the said lands of the plaintiff the said track being a direct road ordinarily used for the purpose of travelling stock to the place of destination mentioned in the said permit which is the alleged trespass."

On the trial before *Campbell* J. and a jury, a request for a direction to the jury to find a verdict for the plaintiff having been refused, the jury returned a verdict for the plaintiff for one farthing damages. The defendant moved before the Full Court for a new trial, or that a verdict be entered for the defendant, on the ground (*inter alia*) that the trial Judge was in error in directing the jury that the defendant was not entitled under his permit to travel stock by the way in question unless that way had been used as a road by the public for three years and upwards openly and without objection of the owners of the land through which it passed. The Full Court made an order granting a new trial: *Robinson & Vincent* v. *Rice* (1).

From that decision the plaintiff now, by leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

*Loxton* K.C. (with him *McMinn*), for the appellant. The existence of a road depends on the intention express or implied of the owner of the land to dedicate it as a road. User may be evidence of that intention. It was not the intention of the *Pastures Protection Act* 1912 (N.S.W.) to create roads: the only intention was to regulate traffic on roads. The definition of " road " in sec. 4 as a road which has been ordinarily used for three years by the public is not satisfied unless it is proved that a road exists and that it has been ordinarily used by the public for three years. Sec. 107 clearly indicates that travelling stock must be taken by a road and that the road is one usually taken by travelling stock. It gives no right to interfere with the proprietary rights of owners of land. There is no sufficient evidence of user by the public for three years.

*Halse Rogers* (with him *Rainbow*), for the respondent. In determining whether a way comes within the definition in sec. 4 as being a road which has been ordinarily used by the public for three years, the question is not whether there has been a dedication or whether it is a highway; but the question is whether the way is one which has been ordinarily used by the public for coming and going. The history of sec. 107 shows that the question

(1) (1925) 25 S.R. (N.S.W.) 436.

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whether the owner of the land has objected to the user is not a factor in determining the question (see *Diseases in Sheep Act of* 1853 (N.S.W.) (17 Vict. No. 27), secs. 2, 3 ; *Diseases in Sheep Act of* 1866 (N.S.W.) (30 Vict. No. 16), sec. 2 ; *Diseases in Sheep Acts Amendment Act of* 1878 (N.S.W.) (41 Vict. No. 19), secs. 14, 15 ; *Stock Act* 1901 (N.S.W.) (No. 27 of 1901), secs. 3, 18, 68). The first words of sec. 4 of the *Pastures Protection Act* 1912 are exhaustive except as to a way by user. If it is shown that the way has been ordinarily used by the public for three years, it is not necessary for the purposes of sec. 107 to show also that it has been used for travelling stock during the whole of that period. There is sufficient evidence to justify a finding in the defendant's favour as to user. [Counsel referred to *Hogan* v. *Brasier* (1).]

*Cur. adv. vult.*

May 7. The following written judgments were delivered :—

KNOX C.J. This is an appeal by leave from an order of the Supreme Court setting aside a verdict for the plaintiff and directing a new trial in an action in which the appellant sued the respondent for trespass on certain lands held by the appellant under lease from the Crown.

The respondent relied on sec. 107 of the *Pastures Protection Act* 1912 as justifying the trespass alleged, which consisted in his driving cattle across the lands of the appellant to an adjoining holding. That section, so far as now relevant, is in the words following : " (1) All travelling stock shall be taken by the drover thereof by any direct road ordinarily used for the purpose of travelling stock to the place of destination mentioned in the permit or travelling statement, as the case may be, for such stock. Provided that where there is a travelling stock or camping reserve leading to the place of destination mentioned in the permit or travelling statement, travelling stock shall be taken by such reserve where practicable." For the purposes of Part IV. of the Act, which includes section 107, " road " is defined as including " any road which has been ordinarily used by the public for three years " ; and it was on this definition

(1) (1917) 17 S.R. (N.S.W.) 559.

that the respondent relied. He contended that sec. 107 conferred a right to drive stock over any land which had been ordinarily used as a road by the public for three years, even if no right existed apart from that section to drive stock across the land in question.

In the view which I take of this case it is unnecessary to determine whether the section has this effect, or whether, on the other hand, it should not rather be construed as restricting existing rights.

On any construction of the section it can apply only where the land in question has been ordinarily used by the public for three years for the purpose of travelling stock to the place of destination mentioned in the permit, that is, in the present case, to Myroolia. The burden of proving that the track along which the cattle were driven had been so used was on the respondent, and, in my opinion, there was no evidence fit to be left to the jury in support of that proposition.

The trespass alleged was committed on 16th August 1924. There was some evidence that on a few isolated occasions stock had been driven along the track in question to Myroolia, but there is nothing to show that any of these occasions was before the year 1923, and, on the other hand, it appears from the evidence that in the month of September 1923 the respondent asked for and received permission from the appellant to drive stock along this track to Myroolia.

In my opinion, the jury should have been directed to find a verdict for the plaintiff on the ground that there was no evidence fit for them to consider in support of the defendant's plea.

It follows that the order setting aside the verdict directing a new trial should not have been made, and should now be discharged and a verdict entered for the plaintiff for one farthing.

ISAACS J. The question is whether, on the evidence as given, the defendant (the respondent here) must necessarily fail on his third plea. There are two averments in the plea, which for present purposes must be carefully kept distinct. One is that "a track which had been ordinarily used by the public as a way for upwards of three years before the alleged grievances was a road within the meaning of the *Pastures Protection Act* 1912." The other is that the

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said track was "a direct road ordinarily used for the purpose of travelling stock to the place of destination mentioned in the permit." As to the first, based on the definition of "road" in sec. 4 of the Act, the Full Court held that the user contemplated by the Act may exist notwithstanding objection by the owner of the land. In view of this ruling a new trial was ordered on the ground of misdirection. So far, I am of opinion the Full Court was right. But a deeper question exists, namely, whether, even supposing the proper direction given, there was evidence upon which the jury could reasonably have found the third plea proved. Taking the first mentioned averment, to begin with, I think the plaintiff at the trial was entitled to the direction asked for. The evidence as to user was, in my opinion, too scanty to be capable of supporting a finding that the land prima facie trespassed upon was "ordinarily used by the public as a way." "Ordinarily" there, I think, means so frequently as to be a customary practice; and this customary user must be "by the public." The public represents the community, in the same sense as would be applicable to a proclaimed road. "User by the public" means as in the general right of the community to pass along the road. If that general right is exercised for three years, to an extent in volume and time that indicates it has become customary, so that the community may henceforth regard the right as established, the definition is satisfied. But, to my mind, the occasions proved are much too scanty as to volume, and too isolated, to be capable of that interpretation. Apart from that, any user before 1923—the alleged trespass being in August 1924—is altogether inconsiderable. The legislative period of what I may call prescription is not satisfied. A necessary averment, therefore, fails of proof. I say "necessary" because the word "road" in sec. 107 cannot be satisfied in this case otherwise than by proof of that averment, there being none as to the land being otherwise a "road" within the meaning of the section.

This is sufficient to determine the case, and to entitle the appellant, not to maintain the verdict given, but to ask the Court to exercise its powers under the *Supreme Court Procedure Act* 1900, sec. 7, by directing that a verdict be entered for the appellant.

HIGGINS J. This appeal is from an order made by the Full Supreme Court of New South Wales, directing a new trial because of an alleged misdirection of the jury by *Campbell* J. The verdict of the jury was for the plaintiff. The action is for trespass in travelling stock through three Crown leaseholds held by the plaintiff; and there is one count for each leasehold. The case turns on the third plea—a plea of justification :—" And for a third plea the defendant says that through all the said lands there existed a track which had been ordinarily used by the public as a way for upwards of three years before the alleged grievances " and " was a road within the meaning of the *Pastures Protection Act* 1912 and the Acts amending the same And the defendant having obtained a permit under the provisions of the *Pastures Protection Act* 1912 and the Acts amending the same to travel certain stock from Bourke to a certain destination in the said permit named gave the same into the charge of a certain drover And the said drover having observed all the requirements of the said Acts and the regulations made thereunder took the said cattle for the purpose of reaching the said destination along the said lands of the plaintiffs the said track being a direct road ordinarily used for the purpose of travelling stock to the place of destination mentioned in the said permit which is the alleged trespass."

There is no demurrer to this plea ; and the only question for the jury was whether the plea had been proved. By their verdict the jury said, in effect, that the plea had not been proved ; but a new trial has been directed by the Full Supreme Court on the ground that the trial Judge misdirected the jury as to what was essential to the proof of the plea. By sec. 107 of the *Pastures Protection Act* 1912 it is enacted that " (1) All travelling stock shall be taken by the drover thereof by any direct road ordinarily used for the purpose of travelling stock to the place of destination mentioned in the permit . . . for such stock. Provided that where there is a travelling stock or camping reserve leading to the place of destination mentioned in the permit . . . travelling stock shall be taken by such reserve where practicable." Now, the plea assumes that the permit granted by the permit inspector, taken with the directions given by sec. 107 as to the road for

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travelling the stock, confers in some way a right for the drover to travel the stock over ground over which otherwise he would have no right to travel the stock. For my part, I think that the assumption is unfounded. I think that the permit confers no such right, and that sec. 107 restricts, does not enlarge, the right of the drover in his choice of roads to the destination stated in the permit. Permits are prescribed by sec. 105 (1). A permit has to be obtained from a Government inspector to travel stock to their destination by the " route " specified in the permit. The " route " does not mean the precise way or land by which the stock are to travel; the permit does not give any title to use any precise way or land; but, as a precaution against infection of other stock, the owner of the stock travelling has to let the inspector know the " route " and the destination, and the inspector has to sanction it. In this case the destination as stated in the permit is " Myroolia," and the " route " is described as " T.S.R." (travelling stock reserve) " direct to Bourke, thence via North Bourke and Gumbalie." This was not meant to give title to travel the stock over any specific way or land. For my part, to prevent any misunderstanding, I must say that at present sec. 107, with its mandatory words " shall be taken " and coupled with the permit, does not give a new right to the owner of the stock but imposes a restriction. But, as there is no demurrer to the plea, I propose to confine my attention to the question whether the jury's verdict, to the effect that the plea had not been proved, was obtained under a right direction from the learned trial Judge, and then to the question whether, if the direction was wrong, a new trial ought to have been granted. Under sec. 107 the drover has to take the stock " by any *direct road* ordinarily used for the purpose of travelling stock." In sec. 4 the word " road " is defined as meaning (unless the context forbid): " any land proclaimed, dedicated, resumed, or otherwise provided as a public thoroughfare or way, or any land defined, reserved, or left as a road in any subdivision of Crown lands, and for the purposes of Part IV." (sec. 107 is within Part IV.) " includes any road which has been ordinarily used for three years at least by the public." There was here no land proclaimed &c., no land defined &c. in any subdivision; but the defendant alleges in his plea that the

track which he used came within the third category, as "a road which has been ordinarily used for three years at least by the public." In directing the jury as to the meaning of these words, *Campbell* J. said (1):—"Now I have to tell you that a road in the statutory sense could not be constituted by mere occasional user by Curran" (Curran had purchased the stock from Rice, and Rice was fetching the stock to Curran) "or by persons instructed or invited by Curran to come that way over this period of three years. To satisfy the statutory expression—a road which has been ordinarily used by the public—I tell you, as a matter of law, that to constitute such a road there must have been a user for at least three years by the public in the exercise of a public right and without objection." When the jury retired counsel for the defendant asked the Judge to tell the jury that the user in the exercise of a public right need not be "without objection," but need only be "without permission"; but the Judge declined to do so. It is because of these words "without objection," that a new trial has been ordered.

In my opinion, *Ferguson* J. and the other members of the Full Court were right in saying there was a misdirection. If the issue were one as to dedication in the full sense, of a public way by user, the absence of interruption or the absence of objection would, in many cases, be very material; but I do not see how the learned trial Judge was justified in adding the words "without objection" to the words of sec. 4. The language of the definition is straight and unqualified; and, however startling the result may seem to those familiar with old-world principles as to roads, it would appear that a drover of stock in New South Wales is allowed to treat, for his purposes, a track which has been ordinarily used for three years at least by the public in the same way as if it were a way dedicated duly to the public. (I am assuming, in favour of the defendant, that the words "includes any road," in sec. 4, refer to a road *de facto*, or a track). Such a provision is probably by no means unsuited to a land of such vast pastures and distances as Australia.

Assuming then, that the direction was wrong, should there be a new trial? In New South Wales the Judicature system of England has not been adopted, and I understand that there is no Act or regulation to the same effect as in Order XXXIX., r. 6, of the English

(1) (1925) 25 S.R. (N.S.W.), at p. 437.

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Judicature Rules—that a new trial shall not be granted on the ground of misdirection or the improper admission or rejection of evidence, &c., unless in the opinion of the Court of Appeal "some substantial wrong or miscarriage has been thereby occasioned." But the same principle applied both before the *Common Law Procedure Act* 1852 and since that Act, in England, and was applied in New South Wales. According to *Chitty's Archbold's Practice*, 12th ed. (1866), p. 1519: "The Court may refuse a new trial, though evidence has been improperly rejected, as where the fact which such evidence was offered to establish was proved by other means, or was not disputed, or was admitted by the opposite counsel; or where, assuming the rejected evidence to have been received, a verdict in favour of the party offering it would have been clearly and manifestly against the weight of evidence, and certainly set aside . . . as an improper verdict." These last words are practically the same words as *Parke* B. used in *Crease* v. *Barrett* (1); and see to the same effect *Baron de Rutzen* v. *Farr* (2); *Wright* v. *Doe* (3), &c. "An application for a new trial is an application to the discretion of the Court, who ought to exercise that discretion in such a manner as will best answer the ends of justice" (per *Ashurst* J. in *Edmondson* v. *Machell* (4)). The new trial will only be granted if the Courts are satisfied that injustice has been done by the misdirection (*Chitty's Archbold's Practice*, p. 1519). I have therefore carefully examined the evidence, and, as a result, I am clearly of opinion that if a jury, on being properly directed as to the meaning of sec. 4, were to find it proved, the verdict would be set aside as being against evidence or the weight of evidence. There is no evidence (so far as I can find) on which a jury could reasonably find that the track in question was ordinarily used for the purpose of travelling stock (sec. 107); or that the track had been ordinarily used for three years at least by the public (that is to say, for three years before the alleged trespass in August 1924). In coming to this conclusion, I assume the contention of the defendant to be right, that the condition as to three years is not to be applied to the words "ordinarily used for the purpose of travelling stock."

(1) (1835) 1 Cr. M. & R. 919, at p. 933.
(2) (1835) 4 Ad. & El. 53.
(3) (1837) 7 Ad. & El. 313.
(4) (1787) 2 T.R. 4, at p. 5.

I am therefore of opinion that this appeal should be allowed, the order for a new trial set aside, and the verdict restored.

RICH J. I consider that it is unnecessary to express any opinion upon the construction of the section in question as I can find no relevant evidence sufficient to support the plea of justification. I agree that a verdict should be entered for the plaintiff (appellant).

STARKE J. I agree that there was no evidence fit to be submitted to a jury that a track across the plaintiff's land was ordinarily used by the public for the purpose of travelling stock. Consequently, the defendant failed to establish, in fact, his plea based on the *Pastures Protection Act* 1912 justifying the trespass complained of by the plaintiff. A verdict for the plaintiff should have been directed at the trial, and as a verdict was in fact so found, damages one farthing, it is idle to disturb it at the instance of the defendant, even though it be based upon an inaccurate direction in point of law. Further discussion of the law in this case, and of *Yandama Pastoral Co.* v. *Mundi Mundi Pastoral Co.* (1), mentioned during the argument, is both unnecessary and undesirable.

*Appeal allowed. Order appealed from discharged. Verdict to be entered for the plaintiff for one farthing. Respondent to pay costs in Supreme Court and of this appeal.*

Solicitors for the appellant, *Biddulph & Salenger.*
Solicitors for the respondent, *B. Keith Cohen & Walker.*

B. L.

(1) (1925) 36 C.L.R. 340.