[HIGH COURT OF AUSTRALIA.]

THE TRANSPORT COMMISSIONERS OF NEW SOUTH WALES . . . . . Defendant, } Appellant;

AND

BARTON . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932-1933.

SYDNEY, *Nov.* 29, 1932.

MELBOURNE, *April* 3, 1933.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Negligence—Unfenced railway-line—Pastoral district—Animal straying from adjoining land—Injured by train—Liability of Commissioners—Degree of care—Gundagai to Tumut Railway Act 1900 (*N.S.W.*) (*No.* 43 *of* 1900), *sec.* 6—*Government Railways Act* 1912 (*N.S.W.*) (*No.* 30 *of* 1912), *secs.* 11, 51, 135—*Government Railways* (*Fencing*) *Act* 1902 (*N.S.W.*) (*No.* 76 *of* 1902).

The fact that a government railway-line, passing through pastoral country, is under statutory authority left unfenced, cannot be taken as an implied permission by the Transport Commissioners for stock of adjoining landowners to be upon, or to cross, such line.

An animal straying on such a railway-line is a trespasser, and the only duty owed by the Transport Commissioners to the owner of the animal is not to recklessly disregard its presence, or intentionally inflict injury upon it.

Robert Addie & Sons (*Collieries*) *Ltd.* v. *Dumbreck*, (1929) A.C. 358, followed.

Decision of the Supreme Court of New South Wales (Full Court): *Barton* v. *Transport Commissioners*, (1933) 33 S.R. (N.S.W.) 17, reversed.

APPEAL from the Supreme Court of New South Wales.

The plaintiff, Reginald George Barton of South Gundagai, horse-trainer, brought an action in the District Court against the Railway Commissioners (later styled Transport Commissioners) of New South

Wales, whom he sued as a body corporate, for damages for the loss of a mare killed on the Commissioners' railway from Gundagai to Tumut by reason, as he alleged, of the negligence of the Commissioners or their servants. The line was a Government railway constructed under the authority of the *Gundagai to Tumut Railway Act* 1900 (N.S.W.), sec. 6 of which provided that "notwithstanding the provisions of section one hundred and six of the *Public Works Act* of 1888 the Constructing Authority shall not be required nor compelled nor shall it be the duty of the said Authority to make or maintain any fence along the said line of railway for the accommodation of any person or for any purpose whatsoever; but the said Authority may, in its discretion, make and maintain such fences in connection with the said line of railway as it may think fit." By the *Government Railways Act* 1912 (N.S.W.) the fee simple of the land bearing the railway-line—of which they are also the occupiers—is vested in the Commissioners, and by sec. 135 a penalty is imposed upon persons who permit animals to stray upon railways or upon the approaches thereto. The facts as given in evidence were as follows:—At or about the place where the accident occurred the Commissioners' land, on which the railway is constructed, is thirty-three yards wide and lies between two paddocks of a total area of about four acres belonging to the estate of the plaintiff's deceased father. The railway-line is unfenced on both sides, but at one side of one of the paddocks there is a fence distant about a chain from the railway-line. The plaintiff's mare, which had been let out of a stable, followed, by a track which they usually took, two horses of the plaintiff's on to the railway-line from that side of the paddock. Just then a train whistled as it emerged from a cutting about two hundred yards distant. The two horses cantered away but the mare came on to, and was walking along, the line when the train crashed into the animal, carried it for about twenty-eight yards on the cow-catcher and threw it clear of the rails on to a road. It was said that the line from the cutting to the point of collision was "as straight as a gun-barrel," and the speed of the train was estimated to have been between thirty and forty miles per hour. There was no evidence that the speed varied from the time the whistle sounded at the cutting, and there was some evidence

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

that the whistle again sounded when the train was about twenty or thirty yards from the mare, the mare then being about eighteen yards from a cattle-stop on the Tumut Road. The accident occurred during the daytime. The plaintiff had not received from the Commissioners or their servants any written or verbal permission for his animals to be on the land owned by the Commissioners.

At the hearing before *Coyle* D.C.J. and a jury, counsel for the Commissioners, at the end of the plaintiff's case, asked for a nonsuit on the ground that as the mare was a trespasser it was necessary, by virtue of the decision in *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1), in order for the plaintiff to succeed in the action, for him to prove malicious or wilful damage. The application was refused. Other than evidence as to the value of the mare, no evidence was tendered on behalf of the Commissioners. In his summing-up to the jury the presiding Judge said (*inter alia*):— "In civil actions he who avers must prove, and the plaintiff must weigh down the scales in his favour as regards the cause of action; that is, it is on him to show negligence of the defendant's servants, and in this case, with the knowledge that has been placed before you it is quite clear that the Railway Commissioners and their servants knew that they were running through unfenced land. They knew that on the land adjoining the Railway Commissioners' land was a paddock in which stock was grazing, and if going through that paddock the person in charge of the . . . engine does not keep a look-out, or if he does keep a look-out, makes no effort to prevent running over something, then, gentlemen, if you come to the conclusion in this case that would be negligent, whether it is called malicious negligence or not I do not know—the word 'malicious' seems to me to be rather extraordinary to apply—but, if, as I say, you come to the conclusion that the engine-driver either was not keeping a look-out under the circumstances of this case—either was not keeping a look-out, or, having kept a look-out and seen this animal standing upon the line, did not then take steps to try to avert the accident, that would be negligence for which I will take the responsibility of telling you he would be liable—that is, the Commissioners would be liable." After the summing-up counsel

(1) (1929) A.C. 358.

for the Commissioners asked for formal directions to the jury: (1) that the mare was a trespasser; (2) that there was no legal duty on the part of the Commissioners to keep a look-out for trespassers on their property; (3) that the Commissioners would be liable only if the injury was due to some wilful act involving something more than the absence of reasonable care; and (4) that there was contributory negligence. The presiding Judge declined to direct the jury any further than he had already done. A verdict was found for the plaintiff in the sum of £45, which the Supreme Court, by a majority, refused to set aside: *Barton* v. *Transport Commissioners* (1).

From this decision the Commissioners now, by special leave, appealed to the High Court, an undertaking having been given by them to pay the costs incidental to the appeal in any event.

Watt K.C. (with him *Hutchinson*), for the appellant. The trial Judge should have directed the jury that at the time of the accident the injured animal was trespassing on the railway-line, and, therefore, the Railway Commissioners owed no duty to the respondent in respect of it (*Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (2)). There was no duty on the part of the driver of the train, as the servant of the Commissioners, to maintain a "look-out"; on the contrary, it was the duty of the respondent, as owner, to prevent the animal from trespassing. The Commissioners would only be liable if, knowing of the presence of the animal on the railway-line, the driver wilfully and deliberately caused the train to run over it. The evidence does not disclose, either expressly or inferentially, such knowledge or wilful and deliberate intention on the part of the driver, nor does it disclose that the driver knew that animals were likely to be on the railway-line. The jury should have been instructed as to the three classes of liability: that is, as to trespassers, the limit being malicious damage; as to invitees, the limit being an obligation to take care; and as to licensees, the limit being to protect them from concealed dangers. As to the duty owed to licensees, see *Fairman* v. *Perpetual Investment Building Society* (3).

(1) (1933) 33 S.R. (N.S.W.) 17. (2) (1929) A.C. 358.
(3) (1923) A.C. 74.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

The Commissioners had no interest in the mare, which, therefore, cannot be classed as an invitee. Owners of animals are prohibited from allowing them to stray upon land owned by the Commissioners. Here there are no circumstances which can be construed as an invitation or a licence; therefore the respondent in allowing, by not preventing, his animal to be on the railway-line was committing a trespass. The majority judgment of the Supreme Court imposes too high a standard of care upon the Commissioners, that as between invitor and invitee. Such a standard is inconsistent with the provisions of sec. 135 of the *Government Railways Act* 1912, which make it an offence, and prescribe a penalty therefor, for a person to permit his animals to wander or stray upon railway-lines or approaches thereto.

Maughan K.C. (with him *Pitt*), for the respondent. On the facts it is irrelevant whether the animal in question was a trespasser, or a licensee, or an invitee. The real question of fact left to the jury was: Did the engine-driver fail to keep a look-out, or did he, having kept a look-out and seeing the animal on the line, fail to take steps to avoid the accident, and the jury were told by the trial Judge that, if they found either of the facts, that was negligence for which the Commissioners were liable. The finding of the jury in favour of the respondent was, therefore, a finding of a reckless disregard, on the part of the Commissioners' servant, of the presence of the animal, or of its possible presence, within the meaning of *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1). Even towards a trespasser, a landowner or occupier owes a duty not to wilfully or recklessly cause injury. It is reckless conduct amounting to a breach of duty not to keep a proper look-out upon a train moving at high speed over an unfenced railway-line, especially in pastoral country, and, in view of such reckless conduct, it is immaterial to consider whether the animal was a trespasser or a licensee or an invitee (*Excelsior Wire Rope Co.* v. *Callan* (2); *Mourton* v. *Poulter* (3)). The fact that a railway-line is constructed on unfenced land is, in pastoral districts, an implied permission to

(1) (1929) A.C., at pp. 376, 377. (2) (1930) A.C. 404.
(3) (1930) 2 K.B. 183.

the adjoining owners to allow stock to cross and recross such railway-line. Even though the railway-line is on land owned by the Commissioners, moving trains are sources of danger, that is, "dangerous machinery," of which warning must be given to all, including trespassers (*Mourton* v. *Poulter* (1)). The fact that it is a statutory offence to permit stock to stray on railway-lines is irrelevant and does not conclude the matter. A trespasser does not lose all his rights by trespass, and can bring an action for damages sustained (*Barnes* v. *Ward* (2); *Simpson* v. *Bannerman* (3)). If the question arises as to which category the respondent comes within, the answer is: he is a licensee, the circumstances being such as to show implied, or tacit, permission from the Commissioners to go on to their land (*Cooke* v. *Midland Great Western Railway of Ireland* (4)), and by neglecting to take proper precautions and to give adequate warning the Commissioners failed in their duty to the respondent as licensee (*Gallagher* v. *Humphery* (5); *Salmond* on *Torts*, 7th ed. (1928), p. 458). The trial Judge was not asked to leave this question to the jury: he was only asked to direct the jury to return a verdict on the ground that the Commissioners were right in law; therefore the appellant is not entitled to a new trial. If it is a case of misdirection, or if, as is suggested, the appeal was sought for the purpose of determining the general standard of duty of the Commissioners, the proper course, so far as the respondent is concerned, would be to rescind the leave to appeal.

Watt K.C., in reply. The case of *Barnes* v. *Ward* (2) is distinguishable because the rights there involved were rights to walk along a highway. The principles applicable to this case are as shown in *Grand Trunk Railway of Canada* v. *Barnett* (6).

[STARKE J. referred to *Lowery* v. *Walker* (7).]

Prima facie a person has a right to expect that there will not be anybody on his property.

[*Maughan* K.C. *Grand Trunk Railway of Canada* v. *Barnett* (6) was merely a case of ordinary negligence.]

Cur. adv. vult.

(1) (1930) 2 K.B. 183.
(2) (1850) 9 C.B. 392; 137 E.R. 945.
(3) (1932) 32 S.R. (N.S.W.) 126, at p. 137.
(4) (1909) A.C. 229.
(5) (1862) 10 W.R. 664.
(6) (1911) A.C. 361.
(7) (1911) A.C. 10.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

April 3, 1933.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. The respondent, Reginald George Barton, was the plaintiff in an action against the Railway Commissioners of New South Wales, whom he sued for damages for the loss of a mare killed on the Commissioners' railway from Gundagai to Tumut, by reason, as he alleged, of the negligence of the Commissioners or their servants. The Transport Commissioners of New South Wales were substituted for the Railway Commissioners in these proceedings after the passing of the *Ministry of Transport Act*, No. 3 of 1932. The line was a government railway, constructed, apparently, under the authority of the Act No. 43 of 1900 (repealed by Act No. 34 of 1924 owing to its operation being exhausted), and operated under the authority of the *Government Railways Act* 1912 No. 30 (see sec. 51), and its amendments. The land forming the railway-line was vested in the Commissioners in fee simple (see Act No. 30 of 1912, sec. 11). The *Gundagai to Tumut Railway Act* 1900, sec. 6, provided : " Notwithstanding the provisions of section one hundred and six of the *Public Works Act* of 1888 " (it is sec. 93 of 22 Vict. No. 19), " the Constructing Authority shall not be required nor compelled nor shall it be the duty of the said Authority to make or maintain any fence along the said line of railway for the accommodation of any person or for any purpose whatsoever ; but the said Authority may, in its discretion, make and maintain such fences in connection with the said line of railway as it may think fit." See now the *Government Railways* (*Fencing*) *Act* 1902, No. 76. The provisions of sec. 106 of the *Public Works Act* of 1888 (51 Vict. No. 37) are taken substantially from the English *Railways Clauses Consolidation Act* 1845 (8 & 9 Vict. c. 20), sec. 68. The section imposes on the Constructing Authority a duty towards a limited class only, namely, the owners and occupiers of land adjoining authorized works. (See *Browne and Theobald, Law of Railway Companies*, 4th ed. (1911), pp. 292-295.) It is plain that the statutory duty imposed by sec. 106 cannot be relied upon by the plaintiff in this action, in the face of the provisions of the *Gundagai to Tumut Railway Act* and of the *Government Railways* (*Fencing*) *Act* already mentioned. The liability of the appellants must therefore be determined upon the principles of the common law.

The facts are as follows :—The railway-line runs through property belonging to the estate of William Barton deceased, and is unfenced on both sides. The respondent's mare, and some horses, were grazing on this property. A train, approaching through a cutting, whistled, and the animals turned, and trotted towards the railway-line along a worn track. The train was then some one hundred and fifty to two hundred yards distant, travelling at thirty to forty miles per hour. The horses went across the railway-line, but the mare stood on the line, and then turned and walked in the same direction as the train was travelling. The train did not stop, but again whistled as it got close to the mare. She was run over and killed.

There is no evidence, in our opinion, which warrants the conclusion that the Railway Commissioners expressly or impliedly permitted or acquiesced in the respondent's animal crossing or being upon the railway-line, and their liability in this case must be considered on that basis.

The action was tried with a jury, and the learned presiding Judge thus addressed the jury :—" In civil actions he who avers must prove, and the plaintiff must weigh down the scales in his favour as regards the cause of action ; that is, it is on him to show negligence of the defendant's servants, and in this case, with the knowledge that has been placed before you it is quite clear that the Railway Commissioners and their servants knew that they were running through unfenced land. They knew that on the land adjoining the Railway Commissioners' land was a paddock in which stock was grazing, and if going through that paddock the person in charge of . . . the engine does not keep a look-out, or if he does keep a look-out, makes no effort to prevent running over something, then, gentlemen, if you come to the conclusion in this case that would be negligent, whether it is called malicious negligence or not I do not know—the word ' malicious ' seems to me to be rather extraordinary to apply—but if, as I say, you come to the conclusion that the engine driver either was not keeping a look-out under the circumstances of this case—either was not keeping a look-out, or, having kept a look-out and seen this animal standing upon the line, did not then take steps to try to avert the accident, that would be

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

Gavan Duffy C.J. Starke J.

negligence for which I will take the responsibility of telling you he would be liable—that is the Commissioners would be liable." A verdict was found for the plaintiff for £45, and the Supreme Court refused to set aside the verdict. Special leave to appeal was granted by this Court, and the appeal now falls for decision.

Actionable negligence consists in the neglect of the use of care towards a person towards whom the defendant owes the duty of observing care. The question in the present case is what duty the Railway Commissioners owed to the plaintiff, the respondent. The difficulty " is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken " (*M'Alister* (*or Donoghue*) v. *Stevenson* (1)). " Those who go personally or bring property where they know that they or it may come in collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such a collision " (*Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (2) ; *Geddis* v. *Proprietors of Bann Reservoir* (3)). " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seems to be " every person " who " is " so closely and directly affected by my act that I ought reasonably to have " him " in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question " (*M'Alister* (*or Donoghue*) v. *Stevenson* (4)). So, it is contended that if the Commissioners use locomotive engines with carriages and waggons attached, and run their trains at considerable speeds, they must recognize that if they do not use care, danger must arise, not only to the owners and occupiers of lands adjoining their railway-lines, but to the general public. They are relieved of the burden of fencing their line in the present case, but that only accentuates the care that must be used in other directions if they do not choose to fence.

The main argument for the Commissioners, however, was that the question arose, not between parties who had equal rights *inter se*

(1) (1932) A.C. 562, at p. 619.
(2) (1878) 3 App. Cas. 1155, at p. 1206.
(3) (1878) 3 App. Cas. 430.
(4) (1932) A.C., per Lord *Atkin*, at p. 580.

on the railway-line, but between the Commissioners—the owners and occupiers of the line—and the plaintiff, who had no right whatever to have his animal upon the railway-line and must justify its presence there (*Latham* v. *R. Johnson & Nephew Ltd.* (1)). It is clear that the common law imposes some duty upon the railway authority in respect of animals being or straying upon their railway-line without any authority or permission. Indeed, the Commissioners did not dispute that they and their servants could not justify running over animals intentionally, nor, knowing them to be on a railway-line, could they justify a reckless disregard of their presence (*Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (2); *Excelsior Wire Rope Co.* v. *Callan* (3); *Grand Trunk Railway of Canada* v. *Barnett* (4); *Mourton* v. *Poulter* (5); and see *Cooke* v. *Midland Great Western Railway of Ireland* (6)). This conclusion is based upon the view that the liability of the Commissioners must be measured by the duty of the owner or occupier of property towards persons entering on his property; that a trespasser comes at his peril, and the occupier or owner is only liable in such cases if injury is due to some wilful act involving something more than the absence of reasonable care: there must be some act done with a deliberate intention of doing harm to the trespasser, or at least an act done with a reckless disregard of his presence (*Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (7)). The duty of care, however, which owners and occupiers of property owe to persons being or coming upon their property is but a particular instance of the general duty of care involved in the law of negligence: "the categories of negligence are never closed" (*M'Alister (or Donoghue)* v. *Stevenson* (8)). So we are driven in the present case to consider whether it falls within the category of cases in which the duty owed to certain persons by owners or occupiers in relation to dangers which exist upon their property has been considered and determined, or within the more general principle of the duty of care already referred to.

(1) (1913) 1 K.B. 398, per *Hamilton* L.J., at p. 410.
(2) (1929) A.C. 358.
(3) (1930) A.C. 404.
(4) (1911) A.C. 361.
(5) (1930) 2 K.B. 183.
(6) (1909) A.C. 229.
(7) (1929) A.C., at p. 365.
(8) (1932) A.C., per Lord *Macmillan*, at p. 619.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES. v. BARTON.

Gavan Duffy C.J. Starke J.

The Commissioners engage, under statutory authority, upon an undertaking attended with risk to the public, and to owners and occupiers of property adjoining their railway-line. The Commissioners and the plaintiff are adjoining owners and occupiers of the land, the one lawfully operating a railway, with heavy and fast-moving trains on a line that is unfenced, the other lawfully grazing his stock on paddocks that are unfenced. It must be conceded, as a general rule, that a person is bound to take care that his beasts do not trespass on the land of his neighbour, and he is only bound to take care that his cattle do not wander from his land and trespass on that of his neighbour. (Note to *Pomfret* v. *Ricroft* (1); *Boyle* v. *Tamlyn* (2).) The question has arisen between adjoining owners and occupiers in relation to yew trees, which are well known to be poisonous to horses, and the principles of law involved were thus stated in *Ponting* v. *Noakes* (3):—"It was the duty of the plaintiff to keep his horse from trespassing, and not of the defendants to guard against the consequences of such trespass. Such duty is clear, and the plaintiff might have been liable to the defendants for damage done by his horse whilst so trespassing on the land of the latter" (4). "The hurt which the animal received was due to its wrongful intrusion. It had no right to be there, and its owner, therefore, had no right to complain. . . . We must ask . . . 'in each case whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt.' If he had not, then (unless, indeed, the element of intention to injure, as in *Bird* v. *Holbrook* (5), or of nuisance, as in *Barnes* v. *Ward* (6), is present) no action is maintainable" ((7); *Jordin* v. *Crump* (8)).

These cases are in line with the decision of the House of Lords in *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (9). Again, the conclusion is supported, we think, by the cases under the *Railways Clauses Consolidation Act* 1845, sec. 68, such as *Ricketts*

(1) (1669) 1 Wms. Saund. 321, at p. 322; 85 E.R. 454, at p. 456: Note (*c*).
(2) (1827) 6 B. & C. 329; 108 E.R. 473.
(3) (1894) 2 Q.B. 281.
(4) (1894) 2 Q.B., at pp. 289-290.
(5) (1828) 4 Bing. 628; 130 E.R. 911.
(6) (1850) 9 C.B. 392; 137 E.R. 945.
(7) (1894) 2 Q.B., at p. 286.
(8) (1841) 8 M. & W. 782; 151 E.R. 1256.
(9) (1929) A.C. 358.

v. *East & West India Docks and Birmingham Junction Railway Co.* (1); *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Wallis* (2); *Dixon* v. *Great Western Railway Co.* (3); *Dawson* v. *Midland Railway Co.* (4); *Luscombe* v. *Great Western Railway Co.* (5). All these cases were founded upon an alleged breach of the statutory duty to fence, but they seem to recognize that no duty was imposed upon the railway authorities in respect of adjoining owners and occupiers other than those prescribed by the Act itself. The level-crossing cases are not in point, for there the party complaining was on the crossing as of right, whereas in the present case the party complaining had no right to have his mare on the railway-line.

Some reliance was placed, for the Commissioners, upon sec. 135 of the *Government Railways Act* 1912 (No. 30), which provides: "If any person . . . drives or permits to wander, stray, or be driven upon any such railway, or the approaches thereto, any horse . . . or other beasts or cattle of any kind such person . . . shall forfeit and pay for every such offence any sum not exceeding fifty pounds." But we do not think this section affects the obligations of the parties at common law, and in any case permission involves knowledge of and assent to that which is done, and the facts proved in this case leave it open to doubt whether the plaintiff was guilty of any breach of the section.

The result, in our opinion, is that this case is within and is covered by the category of cases in which the duty of owners and occupiers in relation to dangers upon their property has been settled, and that therefore the direction to the jury cannot be supported. But there was ample evidence to go to the jury of an intentional injury to the plaintiff's mare after she had trespassed, or of a reckless disregard of her presence on the railway-line. The ordinary result should be a new trial, but the appellants were not insistent upon a new trial, so long as the principles defining their liability are settled. Consequently, the better course would be to rescind the special leave to appeal, and order the appellants to pay the costs of the appeal in accordance with their undertaking.

(1) (1852) 12 C.B. 160; 138 E.R. 863.
(2) (1854) 14 C.B. 213; 139 E.R. 88.
(3) (1897) 1 Q.B. 300.
(4) (1872) L.R. 8 Ex. 8.
(5) (1899) 2 Q.B. 313.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

Dixon J.

DIXON J. The ground upon which the majority of the Supreme Court allowed the judgment recovered by the plaintiff to stand was that he had the leave and licence of the defendants for his horses to pass over the defendants' railway-line. *Street* C.J., with whom *Halse Rogers* J. concurred, said (1): "I think that by taking an unfenced line through a grazing area there is, in the absence of special circumstances, an implied invitation to stock grazing on the area to cross and recross the line."

In relieving the railway authority of the statutory duty of fencing the railway for the protection of the adjoining owners, the Legislature must have been aware that, as a result, the line for the most part would remain unfenced and that stock would freely pass over and along the line. Nevertheless, the land over which the railway was constructed was vested in the Commissioners and was left within the operation of the general provision prohibiting any person from permitting animals of any kind to wander, stray, or be driven upon railways. I do not think that any legislative intention is disclosed of conferring upon adjoining owners a licence for their stock to go upon the railway. Nothing was done by the railway authority from which a leave and licence may be inferred except to avail itself of the statutory dispensation from the duty to fence. The conditions in which it did so were exactly those contemplated by the legislation; for the line of railway is named in the enactment. In these circumstances, I am unable to agree in the conclusion that an implied grant of leave and licence should be inferred. Possibly the Legislature did not advert to the general rule of law that a man is bound to see that his cattle do not trespass upon the land of another, and, in the absence of excuse, is responsible for restraining them, unless, by statute, prescription, contract, or other lawful means, an obligation to maintain a fence has been incurred by his neighbour. But, as a result of the legislation absolving the railway authority from any duty to fence, this general rule must apply. "The legislature having legalized railways, they are not subject to any liability beyond the ordinary common law liability, except where the legislature has thought fit to impose it" (per *Cresswell* J., *Ricketts*

(1) (1933) 33 S.R. (N.S.W.), at p. 20.

v. *East and West India Docks and Birmingham Junction Railway Co.* (1)). Accordingly, it was there decided that the railway company was under no obligation of care to exclude the cattle of persons other than the adjoining landowners, who, alone, were entitled to the fulfilment of the statutory duty to fence, and that the dangerous nature of the trade carried on by the defendants cast upon them no obligation to adopt more than ordinary precautions (see per *Jervis* C.J., *Ricketts* v. *East and West India Docks and Birmingham Junction Railway Co.* (2), and comp. *Commissioner of Railways* v. *Raftis* (3)). It follows that the presence of the plaintiff's mare upon the railway-line, not only was unauthorized, but involved the plaintiff in the responsibility of a trespasser.

In reference to the person and property of a trespasser, an occupier is under no obligation of care to prevent injury arising from a dangerous condition of his premises. The possession or occupation of premises imposes upon him no duty towards a trespasser to exercise any degree of care to avert harm caused through the state or character of the premises. In so far, therefore, as the loss of the plaintiff's mare is attributable only to the character of the undertaking established upon the premises where the mare ought not to have been, the plaintiff is not entitled to complain. But it does not follow that those conducting the undertaking might with impunity destroy or injure the animal in the course of their actual operations. Even in reference to the condition of the premises an occupier, in the absence of just cause or excuse, must abstain from intentional injury to a trespasser actual or possible. In the performance of acts likely to inflict harm the measure of duty towards persons who are upon the land, although wrongfully, is perhaps greater and certainly can be no less. In *Degg* v. *Midland Railway Co.* (4), in delivering the judgment of the Court of Exchequer, *Bramwell* B. said :—" We desire not to be understood as laying down any general proposition that a wrongdoer never can maintain an action. If a man commits a trespass to land, the occupier is not justified in shooting him, and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly

(1) (1852) 12 C.B., at p. 176; 138 E.R., at p. 869.
(2) (1852) 12 C.B., at p. 175; 138 E.R., at p. 869.
(3) (1914) 16 W.A.L.R. 45.
(4) (1857) 1 H. & N. 773, at pp. 780-782; 156 E.R. 1413, at p. 1416.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

Dixon J.

and hurt him, an action would lie. . . . But it is obvious, and a truism, to say that a wrongdoer cannot, any more than one who is not a wrongdoer, maintain an action, unless he has a right to complain of the act causing the injury . . . It is not negligent or wrong for a man to fire at a mark in his own grounds at a distance from others, or to ride very rapidly in his own park ; but it is wrong so to fire near to, and so to ride on, the public highway ; and though the quality of the act is not altered, it is wrong in whoever does it, and so far it is as though it were intrinsically wrong. So the act of firing or riding fast in an inclosure becomes wrong if the person doing it sees there is some one near whom it may damage. But the act is wrong in him only for the personal reason that he knows of its danger ; it would not be wrong in anyone else who did not know that."

In *Petrie* v. *Owners of s.s.* "*Rostrevor*" (1) the plaintiff without any lawful authority had laid down oyster beds near the shore of a public navigable river. The defendants' vessel, through improper navigation, went ashore upon the oyster beds. The master became aware of the existence of the oyster beds, but, in getting the vessel off, he injured them. Lord *Ashbourne* C. said (2) :—"What was the standard of care and of caution that was requisite on the part of the owners of the ship towards anybody who might have laid oysters there ? In my opinion it would be an entirely different standard —certainly not the same standard—to that which should be applied if the plaintiff was in lawful possession of an oyster bed, that was there legally under a perfectly legal title. The captain was entitled to get off his ship by any reasonable exercise of seamanship that his own reasonable knowledge might suggest. He was bound, I think, not to be reckless, or careless, or do unnecessary damage to the property in the oysters of anyone, but, within that, I am of opinion that he was entitled to do anything that he reasonably could to effect what was necessarily his primary object, and that was to get away his ship safely, according to his skill and judgment, exercising that skill and judgment bona fide, and fairly avoiding, as far as he could, any reckless, negligent, or careless action that might be detrimental or dangerous to the oysters." *FitzGibbon*

(1) (1898) 2 I.R. 556.

(2) (1898) 2 I.R., at pp. 569-570.

L.J. said (1):—"At the time of the injury therefore the oysters were at the plaintiff's peril in a place open for public navigation where he had no right whatever to place or keep them, and I cannot see that they were under any protection known to the law, except that which affects a private owner's chattels when left in a wrong place at the owner's risk. . . . I assume that he did not abandon his property in the oysters by placing them where he did. The only protection that I can conceive the law to give to chattels left in such a position is the natural duty of every man to cause no unnecessary damage to the property of another." *Holmes* L.J. said (2):—"No doubt if the master knew of the oyster-bed, he would not have been justified in injuring it through recklessness or carelessness. There is a degree of care due to both the person and property of a trespasser." But that duty arises from the known presence of the person or property of the trespasser where harm may be inflicted by acts done upon the premises. The measure of duty has not been clearly defined. In *Grand Trunk Railway of Canada* v. *Barnett* (3) Lord *Robson*, in giving the opinion of the Board referred to injuries to trespassers "due to some wilful act of the owner of the land involving something worse than the absence of reasonable care," and, after mentioning *Lowery* v. *Walker* (4), he said, at p. 370:—"In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care." In *Excelsior Wire Rope Co.* v. *Callan* (5) Viscount *Dunedin* assumed the children to be trespassers but held the defendants liable because their servants had acted "with reckless disregard of the presence of the trespasser," "that the acting was so reckless as to amount to malicious acting." But neither Lord *Robson's* nor Viscount *Dunedin's* remarks may have been intended to include independent acts likely to injure a trespasser in his person or property done with the knowledge of his presence. Further, the case of *Excelsior Wire Rope Co.* v. *Callan* (6) appears to have been decided upon the footing that the defendant was not an occupier of the place where injury was received by the plaintiff (see per Lord *Buckmaster* at p. 407, Lord *Warrington of Clyffe* at p. 411, Lord *Atkin*

(1) (1898) 2 I.R., at p. 573.
(2) (1898) 2 I.R., at p. 585.
(3) (1911) A.C., at p. 370.
(4) (1911) A.C. 10.
(5) (1930)A.C., at p. 411.
(6) (1930) A.C. 404.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

Dixon J.

at p. 412 and Lord *Thankerton* at p. 413). Notwithstanding the observations of *Scrutton* L.J. in *Mourton* v. *Poulter* (1), this circumstance appears completely to distinguish the case from *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (2), where not only were the defendants occupiers but the supposed breach of duty on the part of the defendants consisted not in actively putting the plaintiff's son in jeopardy with knowledge of his presence, but in failing to protect him against a danger which the use of the premises by children necessarily involved. It is true that, in the observations which Viscount *Dunedin* makes (on pp. 375-376) in connection with the Scotch case of *Haughton* v. *North British Railway Co.* (3), he appears to treat malicious or reckless injury as the limit of the occupiers' liability to a trespasser even in respect of positive acts done with knowledge of the trespasser's proximity. But this passage does not necessarily involve a considered opinion that no difference exists between the measure of duty in respect of such acts and that relating to the state of the occupiers' premises. On the other hand, in *Mourton* v. *Poulter* (4) *Scrutton* L.J. placed his decision upon this very distinction. He said, at pp. 190 *et seq.*, the defendant " cut the last root by which the tree was supported, knowing that the tree would fall in about two minutes and that children were standing round, without giving any warning. It has been found by the County Court Judge that the defendant in so behaving was negligent, and that the injury suffered by the plaintiff was due to that negligence. The case may, I think, be compared to one in which, while blasting operations are going on and people are standing round, a man engaged in the work fires a blast without giving any previous warning. It seems to me that the man firing the blast would clearly be guilty of a breach of duty to these people even though they were trespassers, because he would have done an act which might do them an injury and would have done it without warning. In a case such as that the person who is about to do a dangerous act is under a duty to warn even trespassers." The explanation of these diverse statements of the measure of duty owing to a trespasser in reference to positive acts of commission done with a knowledge of

(1) (1930) 2 K.B., at p. 190.
(2) (1929) A.C. 358.
(3) (1892) 20 R. 113.
(4) (1930) 2 K.B. 183.

his presence upon the premises may, perhaps, be found to lie rather in the application than in the conception of the principle. The duty only arises when the trespass has been committed and when, notwithstanding the exclusiveness of his possession upon which the law permits the occupier to rely for insuring the safety of strangers who observe it, an intrusion has taken place. The duty depends upon knowledge of the intrusion and relates to harm then actively done to the person or thing intruding, and not to harm arising out of the intrusion itself without any new agency. Moreover, it depends upon the likelihood of causing damage. If the standard of duty be, as it might be expected to be, the care which a reasonable man in the circumstances would exercise to avoid harm, its application in many cases might well result in an occupier being required to do little or nothing more than refrain from malicious or reckless injury, from acts "the direct and immediate effect of which the defendant must be presumed to have known would be to cause injury to the trespasser" (the phrase of *Cherry* L.J. in *Coffee* v. *McEvoy* (1). For one important circumstance determining the care which would be reasonable is, or might be, the fact that the trespasser is intruding where he has no business. Another is that we do not expect that an occupier conducting operations upon his own land will lightly relinquish, suspend, or divert them, and often the expense or inconvenience of interrupting a normal course of action might be such that nothing but imminent risk to life or limb would be considered reasonably to require it. Again, it would be difficult for the duty to arise unless the occupier not only knew of the presence of the trespasser but also of the danger to which he was or might be exposed. A disregard of the interests of a trespasser whom *ex hypothesi* the occupier knows is in proximity to danger must often appear to merit the description "reckless." But all attempts have failed in the past to fix upon a standard of conduct, an external standard at any rate, which requires less than due care in the circumstances and more than abstention from intentional harm. I think that in relation to the persons and property of trespassers it will not be found possible to formulate an ascertainable standard of such a character. With reference to the safety and security of

(1) (1912) 2 I.R. 290, at p. 309.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

Dixon J.

the premises, I think the occupier is under no higher duty to a trespasser than to refrain from causing intentional harm without a justification such as the prevention by reasonable means of trespass. With reference to positive acts likely to cause harm to others, I think the occupier's duty depends upon knowledge of the presence of the trespasser on his property, and is measured by the care which a reasonable man would take in all the circumstances, including the gravity and likelihood of the probable injury, the character of the intrusion, the nature of the activities causing the danger and the consequences to the occupier of attempting to avoid all injury.

When this standard is applied to the facts of the present case, I am of opinion that the plaintiff should fail. The complaint is for injury to property. The mare destroyed walked upon the line in front of an oncoming train about one hundred and fifty or two hundred yards away. The train was then coming through a cutting and travelling about thirty to forty miles per hour upon a straight line. It whistled as it came from the cutting, and it whistled again continuously as it drew near the mare. There is no evidence of the weight of the train, nor of its general character. Assuming, contrary to the opinion of *Davidson* J., who dissented, that the inference is open that the driver became aware of the presence of the mare as he emerged from the cutting, I do not think that these circumstances disclose evidence of a breach of duty. With a fast-moving and possibly heavy railway train some very definite apprehension of serious mischance is needed to call upon the driver to pull it up with the suddenness required in such a distance to avoid injury. Ordinarily a horse might be expected to move at the sound of train and whistle. When all the elements are considered, the exigencies of the railway service, the likelihood of the animal itself moving, the distance, the speed and the use of the whistle, I think there was no evidence that the driver did what an ordinary reasonable man in all the circumstances would not do.

I think the appeal should be allowed. The plaintiff should be nonsuited.

EVATT J. Throughout this case it was admitted that, but for one circumstance, the horse of the respondent, which was run down and killed by the appellant's train, should be regarded as a trespasser

upon the railway-line of the appellant. That circumstance is the implication supposed to arise from the passage of the *Government Railways* (*Fencing*) *Act* 1902.

Street C.J. (with whom *Halse Rogers* J. concurred) expressed his view of the Act thus (1) :—

> "I do not think that, by relieving the railway authorities from the obligation of fencing, in the cases specified in the *Government Railways* (*Fencing*) *Act* 1902, the Legislature intended to relieve them from the duty of exercising care to avoid accidents, and I think that the exercise of their statutory power of omitting to fence carries with it the duty of exercising ordinary and reasonable care to avoid injury to stock grazing on areas through which an unfenced railway runs. I think that, in the circumstances of these cases, the live-stock in question are to be regarded as invitees, and that that establishes the measure of the Commissioners' liability."

In my opinion the statute in question does no more than enable the Commissioners to dispense in certain specified instances with the ordinary obligation to fence imposed by statute (Act No. 45 of 1912, sec. 83).

By the *Government Railways Act* 1912 the fee simple of the railway-line is vested with the Commissioners and a penalty is imposed upon persons who permit animals to stray upon railways or upon the approaches thereto.

I agree with *Davidson* J. that there was no evidence of any permission or invitation to use the appellant's land and that none of the statutes, expressly or impliedly, create any such license or invitation. The only duty which the appellant owed to the respondent was that owed by an occupier lawfully conducting a transport enterprise upon his own land to the owner of animals trespassing upon that land.

In *Sharrod* v. *London and North Western Railway Co.* (2) it appeared that the plaintiff's sheep got upon the defendant's railway and were run over by a locomotive engine of the defendant. The actual decision turned upon whether the railway company could be sued in trespass as distinct from case. But in the course of his judgment, *Parke* B. said (3) :—

> "If in the present case the plaintiff's cattle had a right to be on the railway, the plaintiff has a remedy, by an action on the case against the company for causing the engine to be driven in such a way as to injure that right ; for the defendants were bound to see that their carriages did not travel at such a

(1) (1933) 33 S.R. (N.S.W.), at p. 25.
(2) (1849) 4 Ex. 580 ; 154 E.R. 1345.
(3) (1849) 4 Ex., at p. 587 ; 154 E.R., at p. 1348.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES. v. BARTON.

Evatt J.

speed as to make it impossible to avoid other persons, who had a lawful right to be there. If the cattle were altogether wrong doers, there has been no neglect or misconduct for which the defendants are responsible. If the cattle had an excuse for being there, as, if they had escaped through defect of fences which the company should have kept up, the cattle were not wrongdoers, though they had no right to be there; and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case."

Upon the facts of the present case, the third position indicated by *Parke* B. does not arise, because the appellant was not under any duty to fence off its land and railway. Neither does the first position arise.

The real question is whether there is any evidence of a breach of the appellant's duty towards the respondent as the owner of trespassing cattle. What is the measure or standard of duty in such circumstances ?

We may leave out of consideration two exceptional classes of case: (1) where an occupier deliberately chooses to "create sources of danger on his land for the express purpose of injuring any persons who may subsequently trespass thereon" (*Injuries to Trespassers* by *William O. Hart*, (1931) *Law Quarterly Review*, vol. XLVII., p. 92, at p. 101); and (2) where the injured trespasser is suing, not the occupier of the land, but a defendant who is himself a licensee or invitee.

In my opinion the appellant, conducting its railway entirely upon its own property, was not under any duty to the respondent to forecast the probability of trespassing cattle and to run its train so as to prevent, by all reasonable precautions, injury to such trespassers. In circumstances like the present, trespassers accept the risk, not only of the premises as land and buildings but also of the enterprise conducted thereon.

It has been suggested that if an occupier becomes aware of the presence of the trespasser, there at once arises a duty not to perform

> "positive acts of negligent misfeasance done by himself with knowledge of the trespasser's presence. The occupier's exemption from any duty of care to a trespasser applies only to the dangerous state of the premises, not to acts done on the premises with knowledge of the trespasser's presence. He who shoots upon his land owes a duty of care not only to persons lawfully there, but to trespassers whom he knows to be there" (*Salmond on Torts*, 7th ed. (1928), p. 469).

To the same general effect is an American opinion (*R. J. Peaslee*, (1914) 27 *Harvard L.R.* 403).

But I think the authorities prevent us from applying this measure of the occupier's duty to the case before us, and that even when a person or an animal is observed to be trespassing upon its railway, the liability of the occupier for negligence only arises

> " where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser " (per Lord *Hailsham* L.C. in *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1)).

The duty is

> " not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him ' " (per Lord *Sumner* in *Latham* v. *R. Johnson & Nephew Ltd.* (2)).
>
> " The occupier," says Mr. *W. O. Hart*, " is only liable to the trespasser for his positive acts causing 'injury either directly malicious or an acting so reckless as to be tantamount to malicious acting.' There is no liability for mere negligence, because the occupier owes no duty of care to the trespasser. For the trespasser to be able to sue, he must be able to show that the occupier both was aware of his presence and did a positive act which was deliberately intended to injure him, or was done recklessly careless whether it injured him or not " (*Law Quarterly Review*, vol. XLVII., at p. 106). The quotation of the learned contributor is from the judgment of Viscount *Dunedin* in *Addie's Case* (3).

It is obvious that facts sufficient to establish a breach of so light a duty will occur infrequently. As a general rule the plaintiff must show that the occupier knew of the actual, or, at least, the very probable, presence of the trespasser upon his land at the very time when some activity fraught with danger to the trespasser was being continued.

But it is certainly not sufficient to prove, as has been suggested here, that the driver of the appellant's train probably knew that there would be cattle trespassing on the railway at some place or other along its length, at some moment of time or other during its long journey, and that he failed to keep a reasonable look-out so as to discover the trespasser and then avoid injuring it.

Upon the facts of this case, I am satisfied that there was no evidence fit to be left to the jury of any breach of duty on the part of the driver towards the respondent as owner of the cattle. There

(1) (1929) A.C., at p. 365. (2) (1913) 1 K.B., at p. 411.
(3) (1929) A.C., at pp. 376, 377.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

Evatt J.

is no evidence that the driver, knowing of the presence of the horse, "wilfully" or "recklessly" or "maliciously" or "wantonly" proceeded to drive ahead, entirely regardless of the risk of its injury or death, or that the driver, believing that the only obstacle to the onward progress of the train must be trespassing cattle or trespassing persons, deliberately refrained from keeping any look-out.

I have assumed that, if there were evidence of such a breach of duty on the part of the driver, the appellant would be legally responsible because the driver was acting in the course of his employment. The correctness of this assumption must depend upon all the circumstances of the particular case. If the facts establish an act of malice, caprice, wantonness or cruelty on the part of a servant, such a state of mind may tell against a finding that the act took place within the course of the servant's employment. I had occasion to discuss one aspect of this interesting and important question in the recent case of *Colonial Mutual Life Assurance Society Ltd.* v. *Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* (1). An apparent dilemma confronts a plaintiff who is injured whilst trespassing upon land, and who sues the occupier in respect of an act of the occupier's servant; because the more clearly the plaintiff establishes a case of wilful or wanton or malicious injury, the less likely is it that the injury has been performed in the course of the servant's employment. It is a mistake to suppose that the animus or motive of a servant whose conduct is instrumental in causing injury, is never a material circumstance in determining whether to impute that conduct to his master. The dilemma is apparent only, but the course which a plaintiff must steer in such circumstances is no easy one.

It follows that, in the present case, there was no breach of duty established, even upon the footing that the conduct and motive of the engine-driver must, as a matter of law, be imputed to the appellant.

In the special circumstances of this test appeal, the law having been determined in the general sense contended for by the appellant and decided by *Davidson* J. in the Supreme Court, I think it is just that the only order this Court should make is to rescind special leave

(1) (1931) 46 C.L.R. 41, at pp. 63-65.

to appeal. The appellant, in accordance with the undertaking given in order to determine the general question of liability, pays the costs of the proceedings in this Court.

McTIERNAN J. The first question for consideration is whether the respondent should, in relation to the Commissioners' premises on which his mare was run down and killed by their train, be regarded as an invitee or licensee, or as a trespasser.

The Transport Commissioners were the owners in fee simple and the occupiers of the land bearing the railway-line on which the mare was killed (*Government Railways Act* 1912, sec. 11). At or about the place where the accident occurred, the appellants' land on which the railway runs, is thirty-three yards wide. It lies between two paddocks of a total area of a little more than three and a half acres. The respondent's horses used to graze in these paddocks. The railway-line is that which runs between Tumut and Gundagai in New South Wales and, pursuant to the *Government Railways* (*Fencing*) *Act* 1902, was left unfenced. At one side of one of these paddocks, there was a fence distant about a chain from the railway-line. The respondent's mare, which had been let out of the stable, went on to the railway-line from that side of the paddock. It followed two horses of the respondent, which also came from that direction. The three animals had crossed the railway-line by a track which they usually took. Just then a train whistled as it emerged from a cutting about two hundred yards off. The two horses cantered away but the mare came on to, and was walking along, the line when the train crashed into the animal, carried it for some distance on the cow-catcher and threw it clear of the rails. It was said that the line from the cutting to the point of collision was as straight as a gun-barrel, and the speed of the train was estimated to have been thirty miles per hour. There was no evidence that the speed varied from the time the train whistled at the cutting. There was some evidence that the train whistled again when it was about twenty or thirty yards from the mare. The owner of stock has a duty at common law not to allow his animals to stray on to his neighbour's land. The duty was described by *Williams* J. in *Cox* v. *Burbidge* (1) in these terms :—" I apprehend

(1) (1863) 13 C.B. (N.S.) 430, at p. 438 ; 143 E.R. 171, at p. 174.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

McTiernan J.

the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass." See also *Tillett* v. *Ward* (1) and the notes to *Pomfret* v. *Ricroft* (2), which are approved by *Jervis* C.J. in *Ricketts* v. *East and West India Docks and Birmingham Junction Railway Co.* (3). It seems clear, therefore, that the question whether the Commissioners are liable to the respondent must be determined on the basis that the respondent was a trespasser, unless it can be shown that the mare was on the railway premises by right or under licence or by invitation to the respondent from the Commissioners. The respondent admitted in cross-examination at the trial that he did not get any permission from the Commissioners to run his horses on their land. The learned Chief Justice, with whom *Halse Rogers* J. agreed, was of opinion that a right or licence or invitation for the respondent to have his horses on the Commissioners' land should in the circumstances, because of the situation of the respondent's land in relation to the railway-line, be taken to be granted by the legislation to which reference will be made. *Davidson* J. was of opinion that the mare was trespassing on the Commissioners' premises when it was killed. Upon a consideration of the provisions of the *Government Railways (Fencing) Act* 1902, particularly sec. 4, the *Public Works Act* 1912, particularly sec. 83, the *Government Railways Act* 1912, particularly sec. 135, the learned Chief Justice of New South Wales said (4):—

"Under the Acts authorizing the construction of railways in this State the obligation to fence is thrown upon the constructing authority for the accommodation and protection of the landowner and his stock, and I cannot believe that, in giving to the constructing authority a discretionary power, in certain specified cases, to omit this obligation, the Legislature ever intended to throw the whole burden of safeguarding his stock against possible injury upon the landowner and intended to exonerate the Commissioners from liability, except in respect of malicious or reckless injury. It was

(1) (1882) 10 Q.B.D. 17, at p. 20.
(2) (1669) 1 Wms. Saund., at p. 322; 85 E.R., at p. 456.
(3) (1852) 12 C.B., at p. 474; 138 E.R., at p. 868.
(4) (1933) 33 S.R. (N.S.W.), at p. 24.

never intended, in my opinion, that, where an unfenced line runs through a grazing area, stock crossing and recrossing from one side of the line to the other should, *ipso facto*, be regarded as trespassers." His Honor concluded from the terms of the statute, that a permission was to be implied in favour of the settler for his stock to cross and recross the railway-line where it ran through paddocks used for the purpose of grazing and where, pursuant to the provisions of the statute, the line was left unfenced. It is true that if his Honor's view were correct, there would be some mitigation of the inconveniences befalling settlers when a railway-line dividing their paddocks is unfenced. But, in my opinion, the statute does not indicate that the Legislature intended to seek the mitigation of those inconveniences by impliedly granting permission for the settlers' stock to cross and recross the railway-line. Indeed, by sec. 135 of the *Government Railways Act* 1912, a penalty is imposed on any person who drives or permits animals of any kind to wander, stray or be driven upon railways or the approaches thereto. The object of the *Government Railways* (*Fencing*) *Act* appears to have been to lighten the financial burden of building and maintaining railway-lines in specified parts of the State. It would be somewhat paradoxical if the effect of the statute is to render the Commissioners liable to pay compensation to settlers whose paddocks are divided by unfenced railway property, for the loss of the stock, which in passing to and from these paddocks, is run down by trains, on the footing that the Act has impliedly granted a licence or invitation to those settlers for stock to cross and recross the line anywhere between the paddocks or at any point between them. Such an implied licence or invitation would probably prove more expensive to the public and the Commissioners in the course of driving trains on unfenced railway-lines than the fulfilment of the obligation to construct and maintain fences from which the Act discharged them. I agree in the view of *Davidson* J. that no implied licence or permission or invitation was granted by the legislation, to the respondent for the mare to be on the railway-line. The true view is, in my opinion, that which the learned Judge expressed in the following terms (1) :—

" The Legislature, in passing the statutes dealing with the subject,

(1) (1933) 33 S.R. (N.S.W.), at p. 31.

H. C. OF A. 1932-1933.

TRANSPORT COMMISSIONERS OF NEW SOUTH WALES v. BARTON.

McTiernan J.

no doubt held the view that the cost of fencing hundreds of miles of lines through most sparsely populated areas would cast too heavy a burden on the general public, so that it was not only left to landowners along such lines to see to the safety of their stock but they were placed under a liability to a penalty if they caused hindrance to the passage of the trains. Moreover, it would surely cause excessive delays and inconvenience to persons using the railways if the drivers of trains were compelled to stop whenever they should see stock on the lines in order to take all precautions to hunt them away." There is not, in my opinion, anything unreasonable or contrary to the express or implied intention of the Legislature, in construing the words of the *Government Railways (Fencing) Act* in their ordinary sense, free from any implication or condition creating a licence or permission or invitation such as that which the majority of the Supreme Court held did arise when the Commissioners took advantage of the provisions of the Act. The Legislature may be presumed to have known that the owners of stock alongside a railway line would probably sustain some inconvenience when it dispensed, in certain specified instances, with the obligation to make and maintain fences which was expressly imposed by sec. 83 of the *Public Works Act* 1912, for the protection and accommodation of persons who were the owners and occupiers of lands adjoining a railway. The Legislature facilitated the building of certain railways by enacting the *Government Railways (Fencing) Act* 1902, and it was, I think, not so much concerned about the inconvenience which some settlers would suffer through some railways being unfenced as about the greater good to be derived from speedy travelling and transport by members of the public including not only the settlers who would not be inconvenienced but those who might be inconvenienced in some respects by leaving the line unfenced. (See *The King* v. *Pease* (1).) The question whether the Commissioners are liable to the respondent for the destruction of his mare should therefore be considered, in my opinion, on the footing that the mare was trespassing on the railway-line and the respondent was a trespasser.

The mare came on to the premises at the respondent's own risk and the Commissioners are not liable merely because of the fact

(1) (1832) 4 B. & Ad. 30, at p. 41; 110 E.R. 366, at p. 371.

that it was killed by a train running on those premises. In *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1), Lord *Hailsham* L.C. stated a formula by which the question may be determined whether the Commissioners are liable to the respondent for the act done on their premises by which the mare was killed. The Lord Chancellor said:—"Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser." The inference cannot, in my opinion, be drawn from the evidence that the driver of the train was involved in culpability to the degree outlined by the Lord Chancellor. There was no evidence that the driver of the train had any reason to expect that stock would be on the line at the place where the accident occurred when the train arrived there (*Batchelor* v. *Fortescue* (2)), or that he saw the horses as the locomotive came from the cutting. In my opinion there is no evidence that the driver was involved in culpability to that degree even if it is a correct inference from the evidence that the train whistled when twenty or thirty yards away, that the driver saw the animal. The train was travelling at thirty miles per hour. It did not accelerate as it approached the mare. There is no evidence from which it may be inferred that it was then reasonable or even possible to stop the train before the mare was hit. Moreover, the railway track was but a strip on a piece of land thirty-three yards wide. There was ample room on both sides of the line for the animal to move off the line. The appellant's application for a nonsuit should, in my opinion, have been granted.

The appeal should be allowed.

Special leave to appeal rescinded.

Solicitor for the appellant, *F. W. Bretnall.*

Solicitors for the respondent, *Wilson & Dodds.*

J. B.

(1) (1929) A.C., at p. 365.

(2) (1883) 11 Q.B.D. 474, at p. 479.