[HIGH COURT OF AUSTRALIA.]

GREGORY . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH RAILWAYS COMMISSIONER . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1941.

MELBOURNE, *Oct.* 7, 8.

SYDNEY, *Dec.* 19.

Rich, Starke, McTiernan and Williams JJ.

Railways (Cth.)—Liability of Commissioner as carrier of goods—Liability as common carrier—Liability for negligence—Validity of by-law excluding liability—Validity of condition of contract of carriage limiting liability—Commonwealth Railways Act 1917-1925 (*No.* 31 *of* 1917—*No.* 11 *of* 1925), *secs.* 4, 29*, 34*, 36*, 81, 82, 88*.

A by-law purporting to have been made under the *Commonwealth Railways Act* 1917-1925 provided as follows:—"The Commissioner will not be liable for the loss or damage to goods at Darwin occurring while the goods are: (*a*) Being received into trucks from any vessel at the Jetty or unloaded from a truck into any vessel at the Jetty; (*b*) on the Jetty or being conveyed between a sorting shed and the Jetty in either direction; (*c*) stored on the Jetty or in a sorting shed; (*d*) in the process of receipt or delivery at a sorting shed; or (*e*) left in trucks standing in the station yard."

* The *Commonwealth Railways Act* 1917-1925 provides as follows:—Sec. 29 (1): "The Commissioner may carry and convey upon the railways all such passengers and goods as are offered for that purpose, . . . and impose such conditions in respect thereof as are, upon the recommendation of the Commissioner, approved by the Minister." Sec. 34: "For the purposes of this Act the Commissioner shall be deemed to be a common carrier, and (except as by this Act otherwise provided) shall be subject to the obligations and entitled to the privileges of common carriers." Sec. 36: "The Commissioner shall maintain the railways and all works in connexion therewith in a state of efficiency, and shall carry persons and goods without negligence or delay." Sec. 88 (1): "The Commissioner may make by-laws, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular for the following:— . . . (*h*) the limitation of the liability of, and the conditions governing the making of claims upon, the Commissioner in respect of any damage to or loss of any goods."

Held, by *Rich*, *Starke* and *Williams* JJ. (*McTiernan* J. dissenting), that the by-law excluded a liability imposed on the Commissioner by the Act to a person injured by the damage to or loss of goods and was therefore beyond the by-law-making power conferred on the Commissioner by sec. 88 of the Act.

One of the general conditions set out in the Commonwealth Railways Goods and Livestock Rates Book for the carriage of goods at Darwin and approved by the Minister pursuant to the *Commonwealth Railways Act* 1917-1925 provided that the Commissioner would not be liable for damage from whatever cause arising to goods lying on the wharf or for goods stolen therefrom whilst under storage or otherwise.

Held, by *Rich*, *Starke* and *McTiernan* JJ. (*Williams* J dissenting), that the Commonwealth Railways Commissioner might validly impose such a condition in respect of the carriage of goods.

Position of the Commonwealth Railways Commissioner as a carrier of goods considered with particular reference to secs. 34 and 36 of the *Commonwealth Railways Act* 1917-1925.

Decision of the Supreme Court of the Northern Territory (*Bathgate* A.J.) reversed.

APPEAL from the Supreme Court of the Northern Territory.

In an action brought in the Supreme Court of the Northern Territory Ancell Clement Gregory (trading as A. C. Gregory & Co.) alleged that the Commonwealth Railways Commissioner had received at the Darwin jetty 350 tons of cement, the property of the plaintiff, and had delivered only 342 tons. The plaintiff claimed the return of the remaining eight tons of cement and damages for its detention, or alternatively damages for its conversion.

In his defence the Commissioner denied the receipt or loss of the cement. Further, or in the alternative, by par. 7 of the defence, he set up and relied upon the provisions of the *Commonwealth Railways Act* 1917-1925 and the by-laws thereunder, and in particular upon by-law No. 21 as amended by by-law No. 60, purporting to have been made in pursuance of the Act. By par. 8 he alleged that the condition set out in clause 12 of the Commonwealth Railways Goods and Livestock Rates, Part 6, 1. General, was a term of the contract made between the plaintiff and the defendant for the delivery of the cement. By par. 9 of the defence he set up, further or in the alternative, that if he received the cement and/or failed to deliver it (which was denied) the failure to deliver was because the cement was stolen whilst lying on or adjacent to the wharf or in a sorting shed or whilst under storage or otherwise on the wharf or in the shed, and he set up and relied on clause 12 of the Commonwealth Railways Goods and Livestock Rates, mentioned in par. 8 of the defence.

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

In his reply, *inter alia*, the plaintiff alleged that the by-law and the condition were invalid.

By-law No. 21, as amended by by-law No. 60, purporting to be made pursuant to the powers conferred upon the Commonwealth Railways Commissioner by the *Commonwealth Railways Act* 1917-1936, provides as follows :—" The Commissioner will not be liable in respect of the loss of or damage to goods at Darwin occurring while the goods are : (*a*) Being received into trucks from any vessel at the Jetty or unloaded from a truck into any vessel at the Jetty ; (*b*) on the Jetty or being conveyed between a sorting shed and the Jetty in either direction ; (*c*) stored on the Jetty or in a sorting shed ; (*d*) in the process of receipt or delivery at a sorting shed ; or (*e*) left in trucks standing in the station yard." The Commonwealth Railways Goods and Livestock Rates, Part 6, 1. General, clause 12, provides as follows :—" The Commissioner will not be responsible for damage from whatever cause arising done to goods lying on or adjacent to the wharf (including shed), nor will he be liable for goods stolen therefrom while under storage or otherwise."

After the close of the pleadings a special case was stated by the parties for the opinion of the Supreme Court of the Northern Territory. The nature of the action and the pleadings were set out in or annexed to the case, which also contained the following facts :—

3. The defendant is the owner of and controls and manages the Darwin Jetty and the Northern Australian railway, which railway terminates on the jetty.

4. The Darwin jetty is the principal means by which goods being brought into or sent out of the Northern Territory by sea are landed from or loaded into ships and is the only means by which goods being brought into or sent out of the town of Darwin by sea are landed from or loaded into ships.

5. The procedure when goods are brought into the Northern Territory over the Darwin jetty is as follows :—(*a*) The goods are taken from the ship's slings by the defendant's servants and placed in railway trucks which have previously been placed in position by the servants of the defendant. (*b*) When full the trucks are drawn over the railway along the jetty and thence to a warehouse or shed (hereinafter referred to as the sorting shed) situated in the town of Darwin and about one half mile from the jetty. At the sorting shed the goods are unloaded and sorted and stacked on the floor of the sorting shed or on the ground in the vicinity of the shed. (*c*) The consignee of any particular parcel of goods then takes a miscellaneous advice note previously received by him from the defendant, his bill of lading and a clearance note issued by the agent for the ship to

the defendant's clerk at the sorting shed. (*d*) The miscellaneous advice note was previously prepared by the clerk from a copy of the ship's manifest received by him from the agent for the ship or the ship's master, and in addition to the particulars obtained from such copy of the ship's manifest had entered thereon the defendant's charges for handling, carrying and wharfage. After receiving payment of the charges and storage charges (if any) from the consignee and comparing and checking the particulars of the goods on the bill of lading, ship's manifest, clearance note and miscellaneous advice note, the clerk initials the said bill of lading and gives the consignee a receipt for the payment. (A specimen copy of the miscellaneous advice note was annexed to the case. It gave notice of the arrival of goods at a station specified therein, set out details of the consignor, description of goods, condition, charges, &c., and contained a statement that it was issued "subject to the *Commonwealth Railways Act* 1917-1925 and any Act incorporated therewith, and to the By-laws and Conditions of the Commissioner.") (*e*) The consignee then produces the initialled bill of lading, the miscellaneous advice note and the receipt for the payment of the charges to the defendant's delivery clerk, who prepares a receipt for the delivery of the goods. The consignee then receives the goods from the delivery clerk, signs the receipt for the goods, and obtains a copy thereof from the delivery clerk.

6. The trucks, the jetty, the railway line, the sorting shed and the land in its vicinity on which goods are stacked are all the property of and controlled and managed by the defendant.

7. The goods are handled exclusively by the servants of the defendant from the moment they leave the ship's slings until they are delivered to the consignee.

9. A considerable time frequently elapses between the landing of a particular parcel of goods on the jetty and the delivery thereof to the consignee owing to one or more of the following circumstances :— (*a*) The consignee does not take delivery of the goods. (*b*) Large quantities have to be handled when two ships simultaneously unload goods at the jetty. (*c*) Industrial disputes among the employees of the shipping companies and the defendant in respect of the unloading and handling of goods. (*d*) The goods cannot be found by the defendant.

10. Goods delivered to the defendant for carriage to the ship's side to be loaded have to be kept by him for various periods up to one month before they are carried away without any default on the part of the defendant on occasions when the ship by which they were intended to be carried away does not so carry them or does

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

not arrive at the jetty for some time after goods have been received by the defendant for shipment by that ship.

11. Particular parcels of goods and the packages in which they are wrapped frequently arrive on the jetty from the ship in a damaged condition, rendering them liable to further damage in the handling of them by the defendant's servants.

12. For some years prior to 1st November 1921, the handling of goods to and from steamers over the jetty at Darwin and the handling of goods within and delivery from the sorting shed was in the hands of a stevedoring company, and during that period considerable trouble was experienced by the company owing to industrial disputes, the high cost of handling goods, slow rate of discharge of goods from ships, damage to and pilfering of goods during the time they were in the hands of the company for delivery to the consignees.

The following questions of law were raised for the opinion of the Court :—

I. Whether the said by-law No. 21 (as amended as aforesaid)—

(*a*) is a valid exercise of the powers conferred upon the defendant by the *Commonwealth Railways Act* 1917-1925 ;

(*b*) is capable of affording the defendant any defence to the plaintiff's claim in this action.

II. Whether the terms set out in clause 12 of the said Commonwealth Railways Goods and Livestock Rates, Part 6, 1. General, form any part of the contract made between the defendant and the consignee of goods who receives a miscellaneous advice note in the form annexed to this case.

III. Whether the defendant has any power or authority in law to incorporate such terms in a contract for the carriage of goods.

IV. Whether the facts alleged in par. 9 of the defence if true are capable of affording the defendant any defence to the plaintiff's claim in this action.

Bathgate A.J., who heard the special case, answered all questions in the affirmative.

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

Eager K.C. (with him *Coppel*), for the appellant. The Commissioner had no power to make by-law 21 or impose condition 12 of the contract of carriage (*Commonwealth Railways Act* 1917-1925, secs. 34, 36). The by-law does not come within sec. 88 of the Act, where the by-law-making power is given. [He referred to *Commonwealth Railways Act* 1917-1925, secs. 4, 27, 28, 29, 33, 34, 36, 88.]

The regulations are unreasonable (*R.* v. *Broad* (1); *Kruse* v. *Johnson* (2)). They are oppressive (*Widgee Shire Council* v. *Bonney* (3); *Jones* v. *Metropolitan Meat Industry Board* (4)).

Condition 12 is beyond the powers conferred by the Act. The provision to relieve the Commissioner from liability for goods stolen is opposed to sec. 36, because goods may be stolen because of the Commissioner's negligence.

The Act imposes limitations on the Commissioner's powers. It is conceded that the Commissioner may limit his liability as a common carrier, but he cannot extinguish his liability. The by-law means that whatever may be the cause of loss, the Commissioner is to be relieved of responsibility. That is clearly opposed to sec. 36. A common carrier must deliver the goods, and his liability does not cease with the carriage; it continues whilst he is storing the goods. If the by-law seeks to limit the Commissioner's liability as a storeman, then *ex hypothesi* it is unlawful, as he seeks to justify it as a carrier. The common carrier's liability is to deliver the goods (*Mitchell* v. *Lancashire and Yorkshire Railway Co.* (5); *Chapman* v. *Great Western Railway Co.* (6)). There is nothing in the Act which allows the Commissioner to act as a wharfinger or warehouseman. He can only carry on those functions as incidental to that of a common carrier. The by-law is invalid because it excludes the liability of the Commissioner for negligence. If the Commissioner carries goods he must comply with statutory obligations. *Joseph Travers & Sons Ltd.* v. *Cooper* (7), *Baston* v. *Dalgety & Co. Ltd.* (8) is on all fours with this case. The effect of sec. 36 is to cast the liability on the Commissioner for negligence or delay; it creates a statutory obligation which a member of the public could enforce.

The by-law is inconsistent with sec. 34, because it obliterates the Commissioner's liability as a common carrier (*Great Northern Railway Co.* v. *L. E. P. Transport & Depository Ltd.* (9)). In *Weir* v. *Victorian Railways Commissioners* (10) the Full Court of Victoria examined a by-law similar in its efficacy to that discussed here and the principles set out therein by *Cussen* J. are relied upon to justify the contention of the appellant. [He referred to *Railways Act* 1928 (Vict.), secs. 4, 95, 128, 205.] The principles are impliedly accepted by *Latham* C.J. in *Henwood* v. *Municipal Tramways Trust* (*S.A.*) (11).

(1) (1915) A.C. 1110.
(2) (1898) 2 Q.B. 91.
(3) (1907) 4 C.L.R. 977.
(4) (1925) 37 C.L.R. 252.
(5) (1875) L.R. 10 Q.B. 256, at p. 260.
(6) (1880) 5 Q.B.D. 278, at p. 281.
(7) (1915) 1 K.B. 73.
(8) (1905) 7 W.A.L.R. 195.
(9) (1922) 2 K.B. 742, at pp. 744, 746, 770.
(10) (1919) V.L.R. 454, at p. 458.
(11) (1938) 60 C.L.R. 438, at p. 447.

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

The limitation of area in the by-law is not a qualification of the common carrier's liability, but is the obliteration of liability in that area. This by-law is an oppressive interference with His Majesty's subjects by the Commissioner who, by the Act, is made a common carrier, and who cannot vary his liability as such, save by reasonable and proper conditions (*R.* v. *Broad* (1); *Williams* v. *Melbourne Corporation* (2)). The by-law does not come within the general provisions of sec. 88 of the Act, nor within the particular provisions with respect to performing services of carriage. Clause 12 in the Rate Book is bad as being opposed to secs. 34 and 36 of the *Commonwealth Railways Act* 1917-1925.

Dean, for the respondent. The effect of sec. 34 of the *Commonwealth Railways Act* 1917-1925 is to qualify the liability created thereby by the words "except as by this Act otherwise provided." Sec. 88 provides a regulation-making power, and regulations made under this power may qualify the common carrier's liability, being excepted under the above-mentioned words. The Commissioner is a common carrier in the sense that he must carry for everybody, but he may limit himself as to his liabilities. In such a case, he is still a common carrier (*Taylor* v. *Railway Commissioners* (3)). Power is conferred by sec. 88 (1) (*b*) to make this by-law. The Commissioner may in any one area limit his liability in respect of some goods which may remain in another area subject to unlimited liability. Geographically and from certain incidents the Commissioner may limit his liability (*Shaw* v. *Great Western Railway Co.* (4)). The liability referred to in the Act means that of a common carrier at common law, under which a common carrier, although still retaining his character as such, was entitled to limit his liability by contract. Under sec. 88 (1) (*b*) and (*h*) the Commissioner can justify the limitation. Secs. 34 and 88 define rights and powers of the Commissioner. Sec. 36 and the following sections set out his duties; they do not create any rights of action in the public (*O'Connor* v. *S. P. Bray Ltd.* (5)). If these provisions in sec. 34 had affected civil rights, one would have thought that it should have been placed amongst the Commissioner's duties in secs. 36 et seq. There would be no cause of action for delay, and so there could not be any for negligence. Sec. 36 is not concerned with civil rights or liabilities at all, and therefore is unaffected by the Commissioner's by-law. Alternatively, even if it does concern civil rights and liabilities, the

(1) (1915) A.C. 1110.
(2) (1933) 49 C.L.R. 142, at pp. 149-150.
(3) (1904) 4 S.R. (N.S.W.) 524; 21 W.N. 165.
(4) (1894) 1 Q.B. 373, at pp. 381, 382.
(5) (1937) 56 C.L.R. 464, at pp. 477, 478.

by-law is not one which is hit by the section, because the latter is concerned only with the carriage of goods or persons. The by-law has nothing to do with the carriage of goods; it simply deals with delivery of goods from ships. *Weir's Case* (1) is distinguishable because it turned on the words of the by-law-making power, as was pointed out by *Cussen* J. *Baston* v. *Dalgety & Co. Ltd.* (2) was wrongly decided. The argument of the appellant, if upheld, has a very far-reaching effect, as it would exclude the right of the Commissioner to enter into special contracts usually entered into by carriers, e.g., owners' risk contracts. It was never intended to go as far as that in sec. 36. If it can be said that a contract of carriage is involved in the delivery between the ship and the shed, then this is a proper case for severance of the invalid portion, viz., "being conveyed from sorting shed to jetty in either direction" (*Olsen* v. *City of Camberwell* (3)). As to unreasonableness, *Williams* v. *Melbourne Corporation* (4) establishes that a by-law of this nature is not invalid on that ground. Sec. 29 of the Act justifies condition 12 of the Rate Book. It can only be invalidated, if at all, by sec. 34; it cannot be by sec. 36.

Eager K.C., in reply. Whatever the true effect of sec. 36, it prevents the Commissioner from absolving himself from liability for negligence.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

RICH J. This is an appeal by leave from an order made in a special case stated in an action brought by the plaintiff appellant against the defendant respondent to recover damages for the detention of certain cement or alternatively the value of the cement and damages for its conversion. The defendant denied the receipt or loss of the cement and alternatively set up and relied upon the provisions of the *Commonwealth Railways Act* 1917-1925 and the by-laws thereunder and in particular upon by-law No. 21 as amended by by-law No. 60 purporting to have been made in pursuance of the Act. Reliance was also placed on condition 12 of the Commonwealth Railways Goods and Livestock Rates, Part 6, 1. General. The parties to the action, instead of proceeding with the trial of the issues of fact raised in the pleadings, stated this case and raised the following questions of law :—

(1) (1919) V.L.R. 454.
(2) (1905) 7 W.A.L.R. 195.
(3) (1926) V.L.R. 58, at p. 69.
(4) (1933) 49 C.L.R. 142.

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

Rich J.

I. Whether the said by-law No. 21 (as amended as aforesaid)
(*a*) is a valid exercise of the powers conferred upon the defendant by the *Commonwealth Railways Act* 1917-1925;
(*b*) is capable of affording the defendant any defence to the plaintiff's claim in this action.

II. Whether the terms set out in clause 12 of the said Commonwealth Railways Goods and Livestock Rates, Part 6, 1. General, form any part of the contract made between the defendant and the consignee of goods who receives a miscellaneous advice note in the form annexed to this case.

III. Whether the defendant has any power or authority in law to incorporate such terms in a contract for the carriage of goods.

IV. Whether the facts alleged in par. 9 of the defence if true are capable of affording the defendant any defence to the plaintiff's claim in this action.

The by-law as amended reads: "The Commissioner will not be liable in respect of the loss of or damage to goods at Darwin occurring while the goods are: (*a*) Being received into trucks from any vessel at the Jetty or unloaded from a truck into any vessel at the Jetty; (*b*) on the Jetty or being conveyed between a sorting shed and the Jetty in either direction; (*c*) stored on the Jetty or in a sorting shed; (*d*) in the process of receipt or delivery at a sorting shed; or (*e*) left in trucks standing in the station yard." And the condition is in the following terms: "The Commissioner will not be responsible for damage, from whatever cause arising, done to goods lying on or adjacent to the wharf (including shed), nor will he be liable for goods stolen therefrom while under storage or otherwise."

It will be observed that the by-law includes conveyance of goods but the condition does not include conveyance. The facts are fully set out in the special case and need not be repeated. The learned trial judge answered the questions in favour of the defendant. On appeal to this Court from his order ground 3 was not argued.

Sec. 88 (1) and (2) of the *Commonwealth Railways Act* 1917-1925 provide that the by-laws made by the Commissioner are not to be inconsistent with the Act and shall have no force or effect until approved by the Governor-General and published in the Gazette: See *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (1). And the main argument on the appeal is that the amended by-law and the condition in question are outside the power conferred upon the Commissioner. Sec. 34 reads as follows: "For the purposes of this Act the Commissioner shall be deemed to be a common carrier, and (except as by this Act otherwise provided) shall be subject to

(1) (1925) 35 C.L.R. 555, at pp. 564, 565.

the obligations and entitled to the privileges of common carriers." Thus the Commissioner is clothed by the statute with the character of a common carrier and made subject to the obligations incident to such character "except as by this Act otherwise provided." It is unnecessary to deal with the obligations of a common carrier, as the advice given to the House of Lords by *Blackburn* J. in *Peek* v. *North Staffordshire Railway Co.* (1) is an authoritative exposition of the law relating to common carriers (*Great Northern Railway Co.* v. *L. E. P. Transport & Depository Ltd.* (2), and the other authorities there cited). The phrase "except as by this Act otherwise provided" includes the power to make by-laws. And sec. 88 (1) (*h*), under which the by-law purports to be made, speaks of "the limitation of the liability of, and the conditions governing the making of claims upon, the Commissioner in respect of any damage to or loss of any goods." A limitation of liability does not justify a total exclusion —which appears to be the effect of the by-law. The "limitation of liability" referred to in sec. 88 (1) (*h*) is similar to that mentioned in sec. 81, and the intention was to empower the making of by-laws fixing a restricted liability upon the Commissioner in respect of any damage to or loss of any goods. This is borne out by the other part of sub-clause *h* of sec. 88 (1), which enables the Commissioner to prescribe the conditions governing the making of claims upon him in respect of such loss or damage. It would be anomalous if the Commissioner were enabled to prescribe conditions upon which claims may be made and at the same time were enabled to prescribe that no claim whatever may be made for such loss or damage. So that, although sec. 34 confers on the Commissioner a wide power of altering a common carrier's obligations for the safety of the goods entrusted to him, it does not enable him to "obliterate and destroy" all responsibility during the period which the contract of carriage covers. It is in this respect that the by-law exceeds the power conferred upon the Commissioner and extends to the services performed by the Commissioner in other capacities which are so interwoven into the services performed *qua* common carrier as not to be severable. I think, therefore, the by-law is *ultra vires* and invalid.

But there remains to be considered the effect of condition 12. This condition specifically exempts the Commissioner from liability in respect of goods no longer in transit which are (*a*) lying on the wharf or adjacent to the wharf (including the shed), or (*b*) stolen from the same places. It is expressly designed for cases in which

(1) (1863) 10 H.L.C. 473 [11 E.R. 1109].

(2) (1922) 2 K.B., at pp. 765, 769, 771.

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

Rich J.

the transit of goods has ended and they are lying on the respondent's premises. This state of affairs is denoted by the phrase "while under storage or otherwise." The words "or otherwise" refer to goods not in the store or shed but which are, e.g., stacked or dumped "in the open." If it had been intended to include "carriage" that word or "transit" would have been inserted in the condition. There is no principle which prevents a common carrier who in his contract undertakes to do more than "commonly carry" or who by the nature of things becomes a bailee from contracting to fix the conditions of liability (if any) he is prepared to assume in respect of these additional functions. The condition seems reasonably to meet the circumstances of railway transit at its beginning or end of carriage to or from abroad at Darwin. The circumstances of carriage of goods in the more remote districts to fixed yet inadequately protected points will afford illustrations of the necessity of such conditions in the contracts of common carriers. Provisions in the conditions stressing the fact that "goods in the open are at owner's risk" (5. Storage charges at Darwin Jetty, Goods and Livestock Rates Book, at p. 141) are to the same effect. In any event, I think the clause may be justified as a condition relating to the carriage and conveyance of goods. The source of condition 12 is clearly sec. 29 (1). The Miscellaneous Advice Note "is issued subject to the . . . Act . . . , and to the By-laws and Conditions of the Commissioner." It might be suggested that carriage and conveyance in sec. 29 (1) relate only to transit. That view is, I think, too narrow. "Railway" is defined in sec. 4 as meaning "any railway vested in the Commissioner; and, where necessary, includes all lands, buildings, works, and things connected therewith or appurtenant thereto." "Wharf" means "any wharf, jetty or pier connected with the railways." In my opinion, therefore, the power to impose conditions in respect of the carriage and conveyance of goods extends to matters ancillary to such carriage and conveyance and to wharves and sorting sheds belonging to the Commissioner and used in connection with and for the purpose of the railways. It follows, in my opinion, that on either view expressed a clause such as condition 12 may be incorporated in a contract made by the Commissioner. It will be observed that it does not exclude all liability, but only relieves the Commissioner from liability in certain circumstances.

In my opinion it is now established beyond question that the reasonableness or unreasonableness of a by-law or a condition made under statutory powers is not a separate and distinct ground of invalidity (*Williams* v. *Melbourne Corporation* (1)).

(1) (1933) 49 C.L.R. 142.

When the evidence in this case is heard it will be interesting if a finding be made as to what happened to the eight tons of cement. The pleadings admit of proof that they were never received from the M.V. *Koolinda*.

I am of opinion that the appeal should be allowed and the questions answered as follows:—I. (*a*) No. I. (*b*) No. II. Yes. III. Yes. IV. Yes. The order appealed from should be set aside and in lieu thereof an order made that there be no costs of the special case and of this appeal and that the costs of the action should be reserved to the trial Judge and the matter remitted to him to act in accordance with this order.

Order payment out to the appellant of security lodged in Court.

STARKE J. Appeal by leave from a decision of the Supreme Court of the Northern Territory granted pursuant to the provisions of the Supreme Court Ordinance of the Northern Territory, 1918 No. 21 : See *Northern Territory Acceptance Act* 1910-1919, *Northern Territory* (*Administration*) *Act* 1910-1940 of the Commonwealth.

An action had been brought by the appellant in the Supreme Court of the Northern Territory against the Commonwealth Railways Commissioner claiming the return of some eight tons of cement and damages for its detention, or damages for its conversion, based upon an allegation that the Commissioner had received at the wharf or jetty at Darwin 350 tons of Portland cement, the property of the appellant, and had delivered only 342 tons. A special case was stated by the parties, which raised as questions of law for the opinion of the Court the validity of a by-law numbered 21, and an amendment, and also the validity of certain conditions of carriage and conveyance of goods which were upon the recommendation of the Commissioner approved by the Minister.

By the *Commonwealth Railways Act* 1917-1925, sec. 34, the Commissioner is for the purposes of the Act deemed a common carrier and (except as by the Act or otherwise provided) is subject to the obligations and entitled to the privileges of common carriers. By sec. 36 it is provided that the Commissioner shall maintain the railways and all works in connection therewith in a state of efficiency and shall carry persons or goods without negligence or delay. By sec. 88, the Commissioner may make by-laws not inconsistent with the Act prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act and in particular (*inter alia*) the limitation of the liability of and the conditions governing the making of claims upon the Commissioner in

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

Starke J.

respect of any damage to or loss of any goods. Under this authority, the by-law No. 21 and its amendment, by-law No. 60, were made and approved by the Governor in Council.

The by-law as amended was as follows :—" The Commissioner will not be liable in respect of the loss of or damage to goods at Darwin occurring while the goods are : (*a*) being received into trucks from any vessel at the Jetty or unloaded from a truck into any vessel at the Jetty ; (*b*) on the Jetty or being conveyed between a sorting shed and the Jetty in either direction ; (*c*) stored on the Jetty or in a sorting shed ; (*d*) in the process of receipt or delivery at a sorting shed ; or (*e*) left in trucks standing in the station yard." This by-law, it is said, is inconsistent with secs. 34 and 36 of the Act and is unreasonable.

At the common law, a " common carrier who received goods as such was responsible for every injury occasioned to them by any means " except in certain well-known cases. " He was also bound to receive goods tendered to him for carriage, and was liable to an action if he refused to receive them without reasonable excuse." But apart from statutory provisions he could limit his liability by notice brought home to the consignor or by special contract, whether reasonable or not, for loss arising from negligence however great, and even, it would seem, from gross negligence or misconduct or fraud on the part of his servants (*Peek* v. *North Staffordshire Railway Company* (1), *per Blackburn* J. ; *Shaw* v. *Great Western Railway Co.* (2)). A carrier of passengers was, however, only liable for negligence, but not as an insurer. But, apart from statute, such a carrier could also limit his liability by notice brought home to the passenger or by special contract (*Duckworth* v. *Lancashire and Yorkshire Railway Co.* (3)).

The by-law in the present case is not inconsistent with sec. 34, for that section in terms reserves to the Commissioner the privileges of common carriers, which included the right to limit liability, as already mentioned. But the provisions of sec. 36 must be considered. It does not provide, as in the *Railway and Canal Traffic Act* 1854, 17 & 18 Vict. c. 31, sec. 7, that : " Every such company as aforesaid shall be liable for the loss of or for any injury done to any . . . goods . . . in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability." And this led me to examine the history of the matter.

(1) (1863) 10 H.L.C., at pp. 493, 494 [11 E.R., at pp. 1117, 1118].
(2) (1894) 1 Q.B. 373.
(3) (1901) 84 L.T. 774.

The provision that the railway authority shall be deemed a common carrier goes back a long way in railway administration in Australia. I find it in the Victorian *Public Works Statute of* 1865, sec. 119, taken, according to the side note, from 8 & 9 Vict. c. 20, sec. 89. I can trace no section similar to sec. 36 until 1883, when political management of the State railways in Victoria was abandoned and the administration vested in a non-political body called Commissioners. By sec. 61 of that Act, authority to construct and maintain railways was conferred upon the Commissioners, but "it shall also be the duty of the Commissioners to supervise and see that the railways and the accommodation thereto are maintained in a state of efficiency, and that persons travelling upon such railways are carried without negligence." But even that provision, it is interesting to note, though quite irrelevant for the purpose of construction, was not the form in which the section was introduced into Parliament. In the Bill the section ran: "see that the railways and the accommodation thereto are maintained in a state of efficiency, and that every care is taken to ensure the safety of the travelling public." The words, it was said, were suggestive of "every care, but no responsibility" and "altogether too lax." So an amendment was proposed and carried which substituted the words appearing in the Act No. 767: "the effect of the amendment," it was said, "would be that, in an action for damages arising out of a railway accident, the proof of negligence would rest on the plaintiff" (Victorian *Hansard*, vol. 44, p. 915). The provision of the Victorian Act No. 767 was apparently adopted in New South Wales in 1888, 51 Vict. No. 35, sec. 22, but in this form:—"It shall be the duty of the Commissioners to maintain the railways and all works in connection therewith in a state of efficiency, and to carry persons, animals, and goods without negligence or delay; and in respect of the carriage of persons, animals, and goods, the Commissioners shall be common carriers."

Such, I believe, are the sources of the Commonwealth Act, but it must of course be construed according to its terms and in its own context. The Commissioner is for the purposes of the Act deemed a common carrier, bound to serve the public at large in the matter of carriage, but subject to the powers and authorities contained in the Act. One of those powers is to make by-laws, not inconsistent with the Act, for limitation of the liability of the Commissioner in respect of any damage to or loss of goods. The first limb of sec. 36, which requires the Commissioner to maintain the railways and all works in connection therewith in a state of efficiency, creates a public duty and is more or less a counsel of perfection enforceable possibly by means of the writ of mandamus but conferring no civil rights

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

Starke J.

upon any one. So also the other provision that the Commissioner shall carry passengers and goods without negligence or delay imposes a public duty upon him and according to the doctrine illustrated in *Groves* v. *Wimborne* (*Lord*) (1) creates a right in the individuals for whose protection and benefit the duty has been imposed.

Apart altogether from the statutory provision, I apprehend that the Commissioner would have been under a duty to take reasonable care in the carriage of passengers and have incurred the extraordinary liability of a common carrier already mentioned in the case of goods. The duty of the Commissioner under the Statute to carry goods is in the capacity of carrier and whilst the goods are *in itinere* (*Van Toll* v. *South-Eastern Railway Co.* (2); *Hyde* v. *Trent and Mersey Navigation Company* (3); *Chapman* v. *Great Western Railway Co.* (4)). Again, the Statute only applies to loss or injury caused by the negligence or delay of the Commissioner or his servants. It does not impose any duty in respect of accidental injuries and loss by theft of strangers or the Commissioner's servants, for that is not occasioned by negligence or delay within the meaning of the section: See *Peek* v. *North Staffordshire Railway Company* (5); *Shaw* v. *Great Western Railway Co.* (6); *Duckham Brothers* v. *Great Western Railway Co.* (7). Consequently, by-laws limiting liability in such cases would not be inconsistent with the provisions of sec. 36 of the Act.

Nor, I think, would by-laws limiting the amount of liability for negligence or delay be inconsistent with the provisions of sec. 36 of the Act, nor would they transcend the powers contained in sec. 88, so long as such by-laws did not exempt the Commissioner from liability for negligence or delay and were reasonable in the relevant sense.

This view does not interfere with the provisions of sec. 81, for the by-law-making power in sec. 88 deals only with the limitation of liability in respect of goods. And sec. 82 only operates to relieve the Commissioner from liability in certain cases.

The provisions of sec. 36 impose a duty to take care, but not an unlimited liability in respect of amount in case of a breach of that duty. In my opinion, it is not inconsistent with the provision of that section if the amount of liability be regulated by by-law made under sec. 88 so long as the by-law be reasonable: See and cf. *Weir* v. *Victorian Railways Commissioners* (8).

(1) (1898) 2 Q.B. 402.
(2) (1862) 31 L.J. C.P. 241.
(3) (1793) 5 T.R. 389 [101 E.R. 218].
(4) (1880) 5 Q.B.D. 278.
(5) (1863) 10 H.L.C., at p. 510 [11 E.R., at p. 1124].
(6) (1894) 1 Q.B., at p. 383.
(7) (1899) 80 L.T. 774.
(8) (1919) V.L.R. 454.

Still, in my opinion, the by-law No. 21 as amended by by-law No. 60, transcends the authority given by sec. 88 of the *Commonwealth Railways Act* 1917-1925. It exempts the Commissioner from loss or damage to goods at Darwin, howsoever caused. It is not confined to accidental injuries or to theft or other loss without negligence on the part of the Commissioner. It extends to loss or damage to goods due to the negligence or delay of the Commissioner or his servants and the exemption is not limited in amount. It is unnecessary, therefore, to consider in this case whether the by-law as amended is or is not reasonable. That, I apprehend, is a matter for the Court, though matters of fact may be involved in its determination (*Great Western Railway Co.* v. *McCarthy* (1)). But a by-law is not unreasonable unless it be such that no reasonable man exercising in good faith the powers conferred by the Statute could pass such a by-law (*Widgee Shire Council* v. *Bonney* (2); *Jones* v. *Metropolitan Meat Industry Board* (3)). The conditions at Darwin are, according to the facts stated in par. 12 of the case, remarkable, and apparently require an unusual if not a fantastic exercise of the by-law-making power. Obviously, judges are not in as good a position to judge of the necessities of the local conditions as those whose special duty it is to ascertain and provide for them. It is enough at present to say that the by-law as amended is beyond power, without determining whether it is beyond power because it is unreasonable.

Further, it appears to me inadvisable to determine what is the precise position of the Commissioner in relation to the goods in question in this case. Apparently he loads and unloads goods at Darwin in much the same way as wharfingers act, but whether in so doing he is responsible as a common carrier of the goods should remain open. The Book of Rates, especially Part 1, General Conditions, clauses 2 and 3, and Part 6, the Wharfage Conditions, requires consideration. The case of *Baston* v. *Dalgety & Co. Ltd.* (4) is a decision on the facts there proved. It governs that case and no other.

The conditions of carriage which apply to traffic, *inter alia*, over the North Australia railway (including the Darwin jetty), remain for consideration. By sec. 29 of the *Railways Act*, it is provided that the Commissioner may carry and convey upon the railways all such passengers and goods as are offered for that purpose and may demand such tolls, fares, and charges, and impose such conditions

(1) (1887) 12 App. Cas. 218, at p. 229.
(2) (1907) 4 C.L.R., at p. 983.
(3) (1925) 37 C.L.R., at pp. 260-262.
(4) (1905) 7 W.A.L.R. 195.

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

Starke J.

in respect thereof, as are, upon the recommendation of the Commissioner, approved by the Minister. A book of rates, charges, and conditions was recommended and approved pursuant to this power. Part 6 of this book prescribes wharfage rates and conditions. It controls the berthing of ships at wharves, including the jetty at Darwin, times for loading and discharge, tonnage rates, and so forth. Clause 12 provides :—" The Commissioner will not be responsible for damage, from whatever cause arising, done to goods lying on or adjacent to the wharf (including shed), nor will he be liable for goods stolen therefrom while under storage or otherwise." The book of rules, charges, and conditions, is not a by-law, but notice of the terms upon which the Commissioner carries on the business of the railways, including wharves : See Act, secs. 4, 16 and 29. Passengers travelling on those terms or goods tendered for carriage on those terms bring about a contractual relationship. It may be brought about by express acceptance of the terms or by implication from the circumstances. It is contended that the Commissioner cannot require as a condition of carriage the limitation set forth in clause 12, because it is inconsistent with the Act or is unreasonable : Cf. *Clarke* v. *West Ham Corporation* (1). The Commissioner enjoys a monopoly under the *Commonwealth Railways Act*, but it is a monopoly regulated by the Act itself. He can only make by-laws if and so far as the Act allows. He can only demand tolls, fares, charges, and impose conditions in respect of the carriage of passengers or goods on the railways as the Minister approves, and the provisions of sec. 29 (2) allow. But I find nothing in the Act which prevents the Commissioner from making agreements with his customers limiting his liability, either by public notice brought home to them or by special contract, or makes such agreements inconsistent with the Act itself, so long as they be reasonable. I say so long as they be reasonable, for the Commissioner has a monopoly and has a duty to serve the public at large in the matter of carriage. He cannot refuse to perform his duty by imposing arbitrary and capricious conditions upon the public desirous of using the railways. At the common law, as we have seen, carriers could have so limited their liability by special contracts, whether reasonable or not. Again, there is nothing in the Act which prevents members of the public from relieving the Commissioner of the duty of care imposed upon him by the provisions of sec. 36. The duty is imposed for the benefit of such persons, but it is not an absolute duty. But the Commissioner, I would again say, cannot refuse to perform his duty under the Act by insisting upon a limitation of liability in the matter of

(1) (1909) 2 K.B. 858.

carriage that is unreasonable in the sense that it is arbitrary and capricious. And it is for the Court to determine whether the contract or condition imposed is or is not reasonable.

In my opinion, clause 12 is not unreasonable and is therefore a valid condition of the contract between the appellant and the Commissioner. The provision that the Commissioner will not be liable for goods stolen from or adjacent to the wharf incorporated in the contract of the parties is good. It is not inconsistent with sec. 36, for theft, as already observed, is not negligence or delay on the part of the Commissioner. And that provision of the contract is, I think, severable from the preceding sentence. It is not in any way connected with or dependent upon the preceding clause that the Commissioner will not be responsible for damage done to goods lying on or adjacent to the wharf, including shed.

Further, in my opinion, the latter provision is good. It is not unreasonable in the circumstances. It does not wholly exempt the Commissioner from all liability, but only in respect of damage to goods lying on or adjacent to the wharf, including shed. That is not a fantastic or capricious exemption, but one that a reasonable man, knowing local conditions and the practical difficulties of supervising goods left lying on or adjacent to wharves, might well adopt. After all, the clause is not imposed by the Commissioner, but by the Minister upon the recommendation of the Commissioner. The Act contemplates the use of a large discretion, coupled with a sense of responsibility in administrative officers.

Finally, I have assumed that the provision contained in clause 12 relates to the carriage of goods within the meaning of sec. 36. But the book of conditions, Part 6, suggests that goods lying on or adjacent to the wharf are not received by the Commissioner as a carrier, but rather as a wharfinger: Cf. *Benjamin* on *Sale*, 6th ed. (1921), p. 1032. And if this be so all possible inconsistency between clause 12 and sec. 36 disappears.

The judgment below should be discharged, and the questions stated in the case answered as follows:—I. (*a*) No. (*b*) No. II. Yes, the parties having so agreed before this Court. III. Yes. IV. Yes.

McTIERNAN J. The *Commonwealth Railways Act* 1917-1936 constitutes and incorporates the Commonwealth Railways Commissioner and vests in him the railways and rolling stock of the Commonwealth and the wharves, stations and yards used in connection therewith. The provisions enacted for these purposes are to be found in Part II., Divisions 1 and 2 of the Act. Division 3 is headed:

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

McTiernan J.

"Powers of the Commissioner." He has power to carry and convey upon the railways all such passengers and goods as are offered for that purpose and to demand such tolls, fares and charges and impose such conditions in respect thereof as are upon the recommendation of the Commissioner approved by the Minister of State administering the Act. The Commonwealth Goods and Live Stock Rates Book contains the tolls demanded and the conditions imposed pursuant to these powers. Clause 12 of these conditions is in these terms: "The Commissioner will not be responsible for damage, from whatever cause arising, done to goods lying on or adjacent to the wharf (including shed), nor will he be liable for goods stolen therefrom while under storage or otherwise." Division 4 of Part II. of the Act is headed "Duties of the Commissioner." Sec. 34, the first section in this Division, is in these terms: "For the purposes of this Act the Commissioner shall be deemed to be a common carrier, and (except as by this Act otherwise provided) shall be subject to the obligations and entitled to the privileges of common carriers." Sec. 36 reads as follows: "The Commissioner shall maintain the railways and all works in connexion therewith in a state of efficiency, and shall carry persons and goods without negligence or delay." Sec. 88 authorizes the Commissioner to make by-laws which the section says are not to be inconsistent with the Act for the purposes mentioned in that section. No by-law made by the Commissioner is to have any force until it has been approved of by the Governor-General and published in the *Gazette*. Sec. 88 (1) (*b*) provides that the Commissioner may make by-laws for:—"The working of the railways, and the conditions governing the performance of any service which the Commissioner may under the Act carry out or authorize." Among the by-laws which the Commissioner has made are by-laws Nos. 21 and 60. These by-laws, when read together, are as follows: "The Commissioner will not be liable in respect of the loss of or damage to goods at Darwin occurring while the goods are: (*a*) Being received into trucks from any vessel at the Jetty or unloaded from a truck into any vessel at the Jetty; (*b*) On the Jetty or being conveyed between a sorting shed and the Jetty in either direction; (*c*) stored on the Jetty or in a sorting shed; (*d*) in the process of receipt for delivery at a sorting shed; or (*e*) left in trucks standing in the station yard." Both by-laws were approved of by the Governor-General and published in the *Gazette*.

In an action in which the plaintiff sues the Commissioner in detinue and conversion the plaintiff raises the questions:—Whether clause 12 of the Conditions is one which the Commissioner may

lawfully incorporate in a contract of carriage; and, Whether the above-mentioned by-laws Nos. 21 and 60 are authorized by the Act. The questions arise in the following way. The cause of action is that the defendant by his servants received the consignment from the importing ship for delivery to the plaintiff but failed to deliver part of it. In his statement of defence the Commissioner traverses the cause of action and further pleads in the alternative that he agreed to receive the consignment and deliver it to the plaintiff upon the terms of a contract that was subject to the by-laws including Nos. 21 and 60 made under the authority of the *Commonwealth Railways Act* 1917-1925 and the conditions, including clause 12, contained in the Commonwealth Goods and Livestock Rates Book. The action has not been tried. The questions whether the two by-laws are valid and whether the defendant could lawfully incorporate clause 12 in a contract for the carriage of goods were decided by the Supreme Court of the Northern Territory in the defendant's favour on a special case. The appeal is brought pursuant to the leave of this Court from the decision of that Court.

The case contains these facts. The Commissioner owns, controls and manages the jetty at Darwin and the Northern Australian railways. Its line terminates on the jetty. The Commissioner also owns, controls and manages a warehouse or shed, described as the sorting shed. The shed is about half a mile from the jetty. This is the only jetty at Darwin at which ships can discharge or load cargo. The goods are taken by the Commissioner's employees from the importing ship's slings and put by them in railway trucks standing on the jetty. The trucks are hauled over the railway to the sorting shed and unloaded. The goods are sorted and stacked in the sorting shed to await delivery to the consignees. The Commissioner receives the goods at the shed and conveys them by the trucks to the jetty, where the Commissioner's employees put the goods into the exporting ship's slings.

In the performance of these services the Commissioner sustains the character of a common carrier with which sec. 34 invests him, and he is also subject to the duty which sec. 36 imposes upon him. The by-laws and condition 12 extend to relieve him from any liability for negligence resulting in the loss or damage to the goods, the subject of the services. The question is whether the by-laws or condition 12 are or is for that reason inconsistent with sec. 34 or sec. 36. Neither can be valid if there is this inconsistency.

As to sec. 34.—Apart from express contract a common carrier is—with certain exceptions—absolutely responsible for the safety of the goods while they are in his custody as carrier. At law there is no

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

McTiernan J.

restriction on the capacity of common carriers to contract out of this duty. Sec. 34 imposes on the Commissioner the duty of exercising the calling of a public carrier and also his obligations for the safety of the goods, but as regards the obligation with this reservation "except as by this Act otherwise provided." In *Weir* v. *Victorian Railways Commissioners* (1), *Cussen* J. said in reference to sec. 4 of the Victorian *Railways Act* 1915: "I assume, and the assumption is probably correct, that the words in sec. 4, 'except as by this Act otherwise provided,' include a provision in a by-law validly made." The by-laws now in question fall within the terms of sec. 88 (*b*). They prescribe the conditions governing the performance of the service of carrying goods at Darwin between the ship and the shed and the services of stevedore, wharfinger and warehouseman which the Commissioner performs in his character as carrier. The by-laws read with sec. 34 constitute the provisions which are intended by sec. 34 to prescribe the nature of the Commissioner's responsibility in the exercise of his statutory calling of public carrier between the jetty and the sorting shed. It follows that the by-laws are not inconsistent with sec. 34 and also that clause 12 of the Goods and Live Stock Rates Book is not repugnant to that section.

As to sec. 36.—This section imposes on the Commissioner the duties of maintaining the railways and all works in connection therewith in a state of efficiency and to carry persons and goods (a term which by definition includes animals) without negligence or delay. The by-laws now in question purport to discharge the Commissioner's liability for negligently carrying goods between the specified termini at Darwin and for the negligent performance of the subsidiary services of stevedore, wharfinger and warehouseman which, as explained, he performs as a common carrier by statute. There is no inconsistency between the by-laws and the section unless the section gives a right of action to a person aggrieved by a breach of the section. If the section does not give this right of action, the by-law does not take away or interfere with any remedy given by the section. In *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* (2), *Atkin* L.J. said that "when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. Was it intended to make the duty one which was owed to the party aggrieved as well as to the State, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates." Now if sec. 36 were not in the Act it would nevertheless be the duty of the Commissioner to

(1) (1919) V.L.R., at p. 459.

(2) (1923) 2 K.B. 832, at p. 841.

exercise due and reasonable care in carrying persons and goods; and there might be, apart from this section, an action for delay in a train: See *Bullen and Leake's Precedents of Pleading*, 3rd ed. (1868), p. 136. "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently" (*Geddis* v. *Proprietors of Bann Reservoir* (1), per Lord *Blackburn*). Besides, sec. 36 does not command the Commissioner to do any particular thing for the purpose of avoiding injury to passengers or goods or preventing the loss of goods: Cf. *Lochgelly Iron and Coal Co. Ltd.* v. *M'Mullan* (2). The section adds nothing to the Commissioner's duty at law, nor does it give any new remedy to a passenger or consignor aggrieved by the Commissioner's negligence. No penalty is prescribed for a breach of the section. The scope of the section extends beyond the carriage of goods and passengers. The first part of it imposes upon the Commissioner the duty of maintaining the railways and all works in connection therewith in a state of efficiency. In my opinion that duty is imposed in the interests of the Commonwealth. It cannot be presumed that it was the intention of the legislature to make an allegation of inefficiency a matter for litigation or, in other words, to give an individual complaining of such inefficiency a right of action against the Commissioner. It is the second part of sec. 36 which says that the Commissioner shall carry persons or goods without negligence and delay. It is not to be presumed that the intention of the legislature was to give a person aggrieved by the running of the trains at a speed which the Commissioner fixes a right to redress his grievance by an action at law against the Commissioner. Sec. 36 is one of a number of sections which Parliament passed to give directions to the Commissioner as the manager of this public undertaking. Sec. 34 says that he is to be a public carrier, but leaves his obligations to be dealt with in by-laws which the Commissioner is authorized to make but subject to the approval of the Governor-General. The Commissioner is directed by sec. 35 to do all things necessary or convenient for making, maintaining, altering, repairing or using the railways. Sec. 36 commands him to maintain the railways and all works in a state of efficiency and to carry persons and goods without negligence or delay. Sec. 37 directs him to cause to be made a careful inspection of the railways and to be responsible

(1) (1878) 3 App. Cas. 430, at pp. 455, 456. (2) (1934) A.C. 1, at p. 9.

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

McTiernan J.

for ordinary maintenance and such special work as may be authorized by the Minister. He is to prepare in such form as the Minister directs estimates of receipts and expenditure, and to submit statements of proposed works and reports to the Minister (secs. 38, 39, 40, 41, 42). The Commissioner is to propose schemes for carrying out matters of policy specified by the Minister and to notify the Minister as to the financial effect of certain Ministerial directions (secs. 43, 44). The Commissioner is to cause all weights, measures and weighing machines in use on the railways to be adjusted by some employee appointed by him (sec. 45). These sections (from sec. 34 to sec. 45 inclusive) constitute Division 4 of Part II. of the Act. In my opinion the duty which sec. 36 imposes on the Commissioner is not affected at all either by the by-laws Nos. 21 and 60 or by condition 12. It follows that there is no substance in the contention that the by-laws are invalid and the condition is invalid because there is a conflict between the by-laws and sec. 36 and between the condition and this section.

It was also contended that even if the by-laws came within the terms of sec. 88 they should be treated by the Court as invalid because they are unreasonable. The by-laws were approved by the Governor-General pursuant to sec. 88. The objection is not one for which there is any legal foundation (*Williams* v. *Melbourne Corporation* (1)).

In my opinion the appeal should be dismissed with costs.

WILLIAMS J. This appeal raises the question of the validity of by-law No. 21 as amended by by-law No. 60 made in pursuance of sec. 88 of the *Commonwealth Railways Act* 1917-1925, and of the special condition No. 12 of Part 6 (1) of the Commonwealth Railways Goods and Livestock Rates. The by-law is in the following terms :—" The Commissioner will not be liable in respect of the loss of or damage to goods at Darwin occurring while the goods are : (*a*) Being received into trucks from any vessel at the Jetty or unloaded from a truck into any vessel at the Jetty ; (*b*) on the Jetty or being conveyed between a sorting shed and the Jetty in either direction ; (*c*) stored on the jetty or in a sorting shed ; (*d*) in the process of receipt or delivery at a sorting shed ; or (*e*) left in trucks standing in the station yard." The special condition reads :—" 12. The Commissioner will not be responsible for damage from whatever cause arising done to goods lying on or adjacent to the wharf (including shed), nor will he be liable for goods stolen therefrom while under storage or otherwise."

(1) (1933) 49 C.L.R. 142.

One terminus of the railway is at Darwin jetty, and the procedure when goods are brought into the Northern Territory over this jetty is as follows:—The goods are taken from the ship's slings by the Commissioner's servants and placed in railway trucks which have previously been placed in position by his servants and when the trucks are full they are drawn over the railway along the jetty and thence to a sorting shed situated in the town of Darwin and about one half-mile from the jetty. At the sorting shed the goods are unloaded and sorted and stacked on the floor of the sorting shed or on the ground in the vicinity of the shed. The consignee of any particular parcel of goods takes delivery at the shed.

The appellant sued the Commissioner in the Supreme Court of the Northern Territory alleging that eight tons of cement, which were its property, had been lost while in the custody of the Commissioner, after having been delivered to him at the wharf for transit to the sorting shed and delivery there to the appellant. The Commissioner denied that he had ever received the cement, but also alleged, even if he had done so, that he was protected from liability for its loss by the by-law and the condition.

The parties agreed to determine the validity of the by-law and the condition before trying the issues of fact and for this purpose filed a special case, par. 17 of which raised the following questions of law for the opinion of the Court:—

I. Whether the said by-law No. 21 (as amended as aforesaid)—

(*a*) is a valid exercise of the powers conferred upon the defendant by the *Commonwealth Railways Act* 1917-1925;

(*b*) is capable of affording the defendant any defence to the plaintiff's claim in this action.

II. Whether the terms set out in clause 12 of the Commonwealth Railways Goods and Livestock Rates, Part 6, 1. General, form any part of the contract made between the defendant and the consignee of goods who receives a miscellaneous advice note in the form annexed to this case.

III. Whether the defendant has any power or authority in law to incorporate such terms in a contract for the carriage of goods.

IV. Whether the facts alleged in par. 9 of the defence if true are capable of affording the defendant any defence to the plaintiff's claim in this action.

The Court answered all these questions in the affirmative and made an order dismissing the action with costs. It is against this order that the appellant has by leave appealed to this Court.

On the hearing of the appeal, the appellant did not press the third ground mentioned in the notice of appeal, namely: "That clause 12

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

Williams J.

of the Commonwealth Railways Goods and Livestock Rates (Part 6, Division 1) does not form part of the contract made between the respondent and the consignee of goods who receives a miscellaneous advice note in the form annexed to the special case."

Sec. 34 of the Act provides that for the purposes of the Act the Commissioner shall be deemed to be a common carrier, and (except as by the Act otherwise provided) shall be subject to the obligations and entitled to the privileges of common carriers. "At law a common carrier by land is, in the absence of exemption by statute, contract, or notice, or on the ground of fraud, liable for all loss or damage to the goods which he carries for hire, the act of God, the Queen's public enemies, and 'inherent vice' alone excepted; and he is, therefore, in the absence of such exemptions, liable at common law for loss by theft, whether by strangers or by his own servants." But he can by "contracts or notices, when 'brought home,'" protect himself "from everything except wilful acts, such as the conversion of the goods by the carrier himself, or by his agents for that purpose, or wilful misdelivery amounting to a renunciation of the character of bailee" (*Shaw* v. *Great Western Railway Co.* (1); *Great Northern Railway Co.* v. *L. E. P. Transport & Depository Ltd.* (2)).

If sec. 34 stood alone it would appear to follow that the Commissioner could have contracted himself out of his initial liability as a common carrier to this extent. But that section provides that his obligations and privileges are to be subject to the provisions of the Act. The only express limitations of the liability of the Commissioner contained in the Act are, in the case of injury to passengers, secs. 33, 81 and 82, and, in the case of loss of or damage to goods, secs. 27, 33 and 82. Sec. 88 authorizes the Commissioner to make by-laws not inconsistent with the Act prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the following:—(*h*) the limitation of the liability of, and the conditions governing the making of claims upon, the Commissioner in respect to any damage to or loss of any goods.

The Commissioner claims that this sub-sec. *h* justified the making of the by-law. But sec. 36 of the Act provides that the Commissioner shall carry persons and goods without negligence or delay, so that his common-law liability is expressly preserved by the Act where a consignor suffers damage to or loss of his goods through the negligence of the Commissioner or his servants; and, in consequence, any by-law which completely divests a consignor of that right would be inconsistent with sec. 36 and therefore with the provisions of

(1) (1894) 1 Q.B., at pp. 380-382. (2) (1922) 2 K.B. 742.

the Act (*Weir* v. *Victorian Railways Commissioners* (1); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (2)). It would also be a privilege within the meaning of sec. 34 of which the Commissioner was deprived because the Act had otherwise provided. This does not mean that the Commissioner cannot limit his liability to a reasonable amount or make it subject to reasonable conditions governing the making of claims, as, for instance, that they must be made within a certain time after the loss or damage has occurred. Moreover, under the power to levy tolls, fares or charges conferred by sec. 29, he could probably provide two alternative rates, a higher one arrived at after taking into account his liability for negligence and delay under sec. 36, and a lower one to obtain the benefit of which the consignor would have to agree to the Commissioner contracting out of this liability (*Clarke* v. *West Ham Corporation* (3)). He could also relieve himself of all liability as a common carrier other than in respect of negligence or delay or wilful acts, because to do so would be an exercise of the privilege which is expressly conferred upon him by sec. 34 except to the extent to which the Act otherwise provides.

Sec. 36 refers to carrying goods, and the question was raised on the appeal whether in taking delivery of goods from the ship's slings at the jetty and conveying them to the sorting shed the Commissioner was not acting as a stevedore rather than a common carrier. But sec. 34 provides that for the purposes of the Act the Commissioner shall be deemed to be a common carrier; and it seems to me that the facts show that the work in question was part of the business which the Commissioner is authorized by the Act to do, and that he was or must be deemed to have been acting as a common carrier (*Baston* v. *Dalgety & Co. Ltd.* (4)). His liability as a common carrier would commence when he received the goods from the ship's slings and continue until he had notified the consignee that the goods were ready for delivery in the shed, and the consignee, having delayed to take delivery, had become *in mora* (*Mitchell* v. *Lancashire and Yorkshire Railway Co.* (5)).

The by-law as a whole and each of its paragraphs is wide enough to apply to the whole of this period and is inseverable, and therefore wholly invalid.

The condition is narrower than the by-law. If its operation was confined to occasions when the Commissioner had the custody of the goods lying on or adjacent to the wharf including the shed otherwise

(1) (1919) V.L.R., at p. 460.
(2) (1899) 2 Ch. 217.
(3) (1909) 2 K.B. 858.
(4) (1905) 7 W.A.L.R. 195.
(5) (1875) L.R. 10 Q.B., at p. 260.

H. C. OF A. 1941.

GREGORY v. COMMONWEALTH RAILWAYS COMMISSIONER.

Williams J.

than in the course of his carriage it might be valid; but it is wide enough to cover his custody in these places as a common carrier. It divests the Commissioner of his liability for negligence in this capacity and offers no alternative rate. Moreover, its second limb, which includes cases of theft due to negligence, specifically refers to goods while under storage *or otherwise*, and the words italicized are plainly wide enough to include goods in transit. The condition is to the same effect as the first limb of par. *b* and the whole of par. *c* of the by-law. It is as inconsistent with sec. 36 as these paragraphs and to my mind just as invalid.

For these reasons the appeal should be allowed. The order of the Supreme Court should be discharged. The questions asked in the special case should be answered as follows :—I. (*a*) No. (*b*) No. II. Yes. III. No. IV. No. The respondents should pay the costs of the hearing of the special case before the Supreme Court and of this appeal.

Appeal allowed. Questions submitted by special case should be answered as follows: I. (a) No. (b) No. II. Yes. III. Yes. IV. Yes. Order as to costs and verdict set aside, and in lieu thereof order that there be no costs of the special case and of this appeal, and that the costs of the action should be reserved to the trial Judge and the matter remitted to him to act in accordance with this order. Order payment out to the appellant of security lodged in Court.

Solicitors for the appellants, *Newell & Ward*, Darwin, by *Francis S. Newell & Son*, Melbourne.

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

O. J. G.