caused by Morgan and brought to a head by his disappearance. The period which all this took was not long and led to no alteration of position by the company or those interested in it.

In all the circumstances it could not be held that the plaintiff was guilty of undue delay or took a course inconsistent with his renunciation of his shareholding. It follows that the decree for rescission was rightly made and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *M. G. Lyons & Co.*
Solicitors for the respondent, *R. G. Smith & Smith.*

R. A. H.

[HIGH COURT OF AUSTRALIA.]

GREEN AND OTHERS . . . . . APPELLANTS ;
DEFENDANTS,

AND

PERRY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1955.

BRISBANE, *July* 29, *Aug.* 1;

SYDNEY, *Aug.* 23.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Negligence—Sports arena—Injury to spectator—Reasonable likelihood—Mere possibility—Duty of occupier—Safety fence—Adequacy—Escape of bullock from arena.

In a competition of camp drafting, which took place in an arena and consists of a horseman directing a bullock over a marked course within a time-limit, a bullock escaped over the barrier surrounding the arena. The plaintiff, a spectator who was injured, alleged that the occupiers of the ground had negligently failed to take precautions to make the premises safe having regard to the nature of the entertainment or to take any other sufficient steps to ensure that the display was held without undue risk to the spectators. The judge asked the jury whether the plaintiff's injuries were caused by the failure of the defendants to take any, and if so what, precautions to make the grandstand area as safe for spectators as reasonable care and skill could make it. The jury answered that the plaintiff's injuries were so caused, namely by failure to provide a higher barrier.

Held, that the trial judge had correctly stated the principles the jury should apply in considering the question, and that it was open to the jury to make the findings they did.

Fardon v. *Harcourt-Rivington* (1932) 146 L.T. 391, at p. 392 per Lord *Dunedin*, and *Hall* v. *Brooklands Auto Racing Club* (1933) 1 K.B. 205, at p. 228 per *Slesser* L.J., referred to.

Decision of the Supreme Court of Queensland (Full Court), affirmed.

APPEAL from the Supreme Court of Queensland.

On 7th August 1951, whilst a spectator at a competitive exhibition of "camp drafting" at the Exhibition Grounds, Brisbane, Doris Lena Perry sustained personal injuries when a bullock engaged in the exhibition escaped from the arena by scrambling over a fence

surrounding the arena. She sued the trustees of the Royal National Agricultural and Industrial Association of Queensland and the members of its council as the occupiers of the Exhibition Grounds for damages for negligence, alleging negligence in the provision of the fence surrounding the arena. At the trial of the action the jury found a verdict for the plaintiff Perry and assessed damages in the sum of £3,000. An appeal by the defendant trustees and council members to the Full Court of the Supreme Court of Queensland was dismissed.

An appeal was then brought from this decision to the High Court.

The relevant facts and the findings of the jury on the questions left to them, as well as the arguments of counsel, appear sufficiently in the judgment of the Court hereunder.

A. L. Bennett Q.C. (with him *G. Seaman*), for the appellants, referred to *Watson* v. *George* (1); *Paris* v. *Stepney Borough Council* (2); *General Cleaning Contractors Ltd.* v. *Christmas* (3); *Hall* v. *Brooklands Auto-Racing Club* (4); *Murray* v. *Harringay Arena Ltd.* (5); *Hocking* v. *Bell* (6); *Shepherd* v. *Felt & Textiles of Australia Ltd.* (7); *Sheahan* v. *Woulfe* (8); *Douglas* v. *Tiernan* (9); *McPhee* v. *S. Bennett Ltd.* (10); *Davis* v. *Hardy* (11); *Aitken* v. *McMeckan* (12); *Jones* v. *Spencer* (13).

V. Mylne, for the respondent, referred to *Francis* v. *Cockrell* (14); *Cox* v. *Coulson* (15); *Maclenan* v. *Segar* (16); *Norman* v. *Great Western Railway Co.* (17); *Hall* v. *Brooklands Auto-Racing Club* (18); *Welsh* v. *Canterbury and Paragon Ltd.* (19); *Murray* v. *Harringay Arena Ltd.* (5); *Charlesworth, The Law of Negligence*, 2nd ed. (1947), pp. 175, 176.

Cur. adv. vult.

(1) (1953) 89 C.L.R. 409, at pp. 424-426.
(2) (1951) A.C. 367, at p. 382.
(3) (1953) A.C. 180, at p. 192.
(4) (1933) 1 K.B. 205, at pp. 209, 212, 220.
(5) (1951) 2 K.B. 529.
(6) (1945) 71 C.L.R. 430, at p. 444; (1947) 75 C.L.R. 125, at p. 131.
(7) (1931) 45 C.L.R. 359, at pp. 372, 379, 380.
(8) (1927) Q.S.R. 128.
(9) (1931) 32 S.R. (N.S.W.) 149; 49 W.N. 31.
(10) (1934) 52 W.N. (N.S.W.) 8.
(11) (1827) 6 B. & C. 225 [108 E.R. 436].
(12) (1895) A.C. 310.
(13) (1897) 77 L.T. 536.
(14) (1870) L.R. 5 Q.B. 501.
(15) (1916) 2 K.B. 177, at pp. 184, 187, 191.
(16) (1917) 2 K.B. 325, at p. 330.
(17) (1915) 1 K.B. 584.
(18) (1933) 1 K.B. 205, at p. 228.
(19) (1894) 10 T.L.R. 478.

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THE COURT delivered the following written judgment:—

In the suit out of which this appeal arises the present respondent sued the first two appellants, as trustees for the Royal National Agricultural and Industrial Association of Queensland, and the third appellant, on behalf of himself and all other members of the council of that association, for damages in respect of personal injuries sustained by her when a bullock escaped from the sporting arena at the Exhibition Grounds at Brisbane on 7th August 1951. The arena was surrounded by a wooden picket fence about three feet six inches in height and this fence was surmounted by a rail, approximately one foot above the fence, constructed of stout galvanized iron piping. The respondent received her injuries during an exhibition in the arena of a competitive event known as "camp drafting" in the course of which a competitor mounted on a horse seeks to direct a steer or bullock on a prescribed course, indicated by markers in the arena, within a specified time. The process of direction is accomplished by the horseman "turning" the bullock in any desired direction by riding in the vicinity of its opposite side and the event is almost invariably conducted at great speed. The time which was allotted to the competitor in this particular instance was said to be one minute.

Both the beast and the horse engaged in the event when the respondent was injured were, it was alleged, of exceptional speed and, notwithstanding the speed of the horse and the ability of the horseman, they were unable to catch up with the beast as it made for the surrounding fence after it had been released. There was a considerable amount of evidence indicating that almost invariably a bullock will turn of its own accord when it nears the fence during this type of contest. Either the fence itself or the presence of the spectators behind it, with the attendant noise, are said to produce this result. But in this instance the beast did not turn and escaped from the arena either by jumping over the fence or, more probably, by getting the fore-portion of its body over the fence and then falling or scrambling entirely over it. It was in the course of this happening that the respondent, who was a spectator, was injured.

The substance of the respondent's allegation in the suit was that the appellants had negligently failed to take precautions to make the premises safe having regard to the nature of the entertainment or to take any other sufficient steps to ensure that the display was held without undue risk to spectators. The trial was conducted before a jury and at the conclusion of the evidence counsel for the appellants sought to have judgment entered on the ground that

there was no evidence of any such failure. This application was refused and thereafter a question in the following form was submitted to the jury: "Were the plaintiff's injuries caused by the failure of the Council of the Royal National Association to take any and if so what precautions to make the grandstand area as safe for spectators as reasonable care and skill could make it, and, if yes, what damages?" It is not contended that if there was evidence to support the respondent's case this question was not adequate to raise the appropriate issues for the consideration of the jury though some fault was found by counsel for the appellants with the summing up of the learned judge. To the submissions on this aspect of the case brief reference will be made shortly. In the result the jury answered the first part of the question by saying:—"Yes, failure to provide a higher galvanized pipe rail above the existing rail and picket fence increasing the height to six feet" and they assessed damages at £3,000. From the judgment subsequently entered for the plaintiff the appellants appealed unsuccessfully to the Full Court of the Supreme Court and this appeal is brought from the order of that Court.

In the course of this appeal and before the Full Court the appellants placed great reliance upon evidence which established that camp drafting contests have been and are conducted at many centres, that at none of these, other than the show-grounds at Sydney and Tamworth, are the surrounding fences as high as four feet six inches and that the escape of a beast during such contests is a rare occurrence. Indeed, it was contended, the evidence established that the risk of any such occurrence is so extremely remote as to be negligible. It is true that the evidence disclosed that the escape of a beast during contests such as these has been quite unusual and some point was made of the fact that there was no evidence that any beast had ever escaped from an arena surrounded by a fence as high as four feet six inches. In view of the fact that the evidence shows that only at two places was there such a fence this is not surprising. But there was evidence that in 1937 and again in 1939 a beast did escape at the Exhibition Grounds. On these occasions the fence was only three feet six inches in height and it was as the result of these incidents that the iron rail already referred to was added to the fence. It is reasonably clear from the evidence, however, that beasts have escaped from an arena during camp drafting contests only on rare occasions, not because a fence three feet six inches in height has proved to be sufficiently high to prevent a bullock from escaping, but because only on rare occasions

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have they attempted to surmount the fence. As we have already said, almost invariably the bullock is turned before reaching the fence or it turns of its own volition when approaching the fence and the spectators beyond it. This latter circumstance operates substantially to reduce the cogency of the appellants' contention that the evidence establishes that a three feet six inch fence has been adequate except on rare occasions, to prevent beasts from escaping, and, consequently, that the escape of a beast in the course of such a contest is so unlikely that the risk involved is negligible. The respondent, on the other hand, relied upon the evidence which showed that on some occasions beasts had escaped to establish that the possibility of such a happening was not so remote or unlikely as to absolve the appellants from the duty of providing a fence of reasonably adequate height for the protection of spectators against such a possibility. Indeed, it was said, the fact that a beast had escaped at the Exhibition Grounds in 1937 and again in 1939 had established the risk involved as something real and practical and as one which required the provision of reasonable protection for spectators. That reasonable protection against such a risk was necessary, it was said with some force, was evident from the fact that the rail already mentioned was added to the existing fence in 1939 and it was contended upon the evidence that the precautions then taken were not reasonably adequate.

The theme of the argument for the appellants in this appeal was that the escape of a bullock from the arena was so *unlikely* in all the circumstances that no liability should attach to the appellants in respect of the respondent's injuries. If the occurrence was unlikely then the risk involved, it was said, was one in respect of which the appellants were not bound to make any additional provision and one which the respondent, as a spectator, took upon herself. But to endeavour in the circumstances of this case to test the question of liability in this manner is to bypass the real issues in the case. It may be conceded that the escape of a beast from the arena was unusual and that, in this sense, such an occurrence was unlikely. It was unlikely because, as we have already said, only on rare occasions did a beast attempt to surmount the fence. But if no fence were provided it is extremely likely that many bullocks would escape from an arena. Likewise if a fence of obviously inadequate height were provided any bullock endeavouring to escape might well do so. There can be no doubt that the provision of a fence was obviously necessary and it was no less obvious that it was necessary that any fence provided should be

reasonably sufficient to prevent a beast from surmounting it and causing risk of grave injury to the spectators seated behind it. To say, however, that an occurrence of the nature which resulted in the respondent's injuries was *unlikely* is really to confuse the issues involved in this case. The first question which arises on the facts is whether the appellants might reasonably have been expected to foresee that a competitor might lose, or even fail to gain, control of a beast and that it might attempt to escape from the arena. If so, obviously, there was a duty upon the appellants to provide a reasonably adequate fence. But if the possibility of a competitor losing or failing to gain control of a beast was so remote or unlikely as to be beyond the contemplation of reasonably prudent men, then there was no such duty. As Lord *Dunedin* said in *Fardon* v. *Harcourt-Rivington* (1) "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions" (2). The same well-known conception is apparent in the language of *Slesser* L.J. in *Hall* v. *Brooklands Auto Racing Club* (3) when he observed that the first consideration in that case was "whether the misadventure was of so unusual and unexpected a kind that it could not reasonably have been expected" (4). There can be no doubt that upon the evidence in this case the jury was entitled to answer this question adversely to the appellants. Though unusual, in the sense that it was not a frequent happening, the evidence establishes that there was a very real risk of a beast attempting to escape from the arena and, consequently, that the circumstances imposed upon the appellants a duty of providing reasonably adequate protection to spectators against that risk.

In these circumstances the question inevitably arose whether the height of the fence was reasonably adequate for this purpose. On this question there was conflicting evidence from persons experienced in this form of contest. One witness called for the respondent at the trial deposed that when bullocks are raced they are more prone to jump and that, although a four feet six fence may be sufficient to contain a bullock in a paddock in normal circumstances, yet he would not regard a fence as sufficient to prevent a bullock from escaping when raced unless it was five feet six inches or six feet in height. Some bullocks and some breeds

(1) (1932) 146 L.T. 391.
(2) (1932) 146 L.T., at p. 392.
(3) (1933) 1 K.B. 205.
(4) (1933) 1 K.B., at p. 228.

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of bullocks are, he said, wilder than others and it is implicit in his evidence that some bullocks when raced will display more vigorous jumping propensities than others. Evidence called for the appellants at the trial asserted that a four feet six fence was adequate and that the escape of the beast on this occasion was due to the fact that it was quite exceptional. But the impression created by consideration of the evidence called for the appellants on this point is not that the beast's jumping prowess was exceptional but rather that its speed was and that it was this attribute which resulted in the competitor failing to gain control of it after it had been released. The competitor himself says that the bullock was uncontrollable, that " he just went straight and hit the fence and after he hit the fence he scrambled over it ". In cross-examination he agreed that bullocks can scramble over a four feet six inch fence and that this can happen during a camp drafting contest. It is true that the evidence showed that camp drafting contests had been conducted without serious mishap at many country centres with fences no higher than three feet six inches ; but there is little, if any, evidence to show the conditions otherwise under which these contests were conducted. No doubt this evidence was adduced in an endeavour to establish that a fence of that height is reasonably adequate to prevent the escape of a beast from the arena but its value is considerably lessened by the established fact that a fence three feet six inches in height had proved inadequate to prevent beasts escaping on at least two occasions at the Exhibition Grounds. Moreover the spectators at the latter ground were not, as may be the case at some or even many country centres, in a situation where they might readily disperse to avoid injury and what might be regarded as reasonably sufficient in such country centres might well be regarded as not reasonably sufficient at a place such as the Exhibition Grounds. It may be that divergent views might be taken by different minds concerning the adequacy of the fence but the question for us is whether the verdict was such as reasonable men might have given. Whether or not the fence was of reasonably sufficient height was essentially a jury question and in our view there was evidence upon which they were entitled to determine this question in favour of the respondent.

The real substance of the appellants' submissions concerning the inadequacy of the summing up of the learned trial judge to the jury was that he had failed to direct the jury precisely in the language used by Lord *Normand* in *Paris* v. *Stepney Borough Council* (1).

(1) (1951) A.C. 367, at p. 382.