not obliged to yield up the premises in as good a state as when they were demised to him. This would still leave him liable to repair specific dilapidations covered by a covenant to repair or by the obligation to use in a tenantlike manner. The same limited scope of the exception may have been intended when it was introduced into covenants to keep in repair during the term. At any rate it was the traditional attitude to regard the exception as being of no great significance, and accordingly something of a shock was caused when in *Taylor v. Webb* the Court of Appeal put a literal construction on the exception and applied the usual rule that a person who is under no duty as regards immediate damage is also free of responsibility for what flows from that damage.

W. N. HARRISON*

TORTS

Occupiers' Liability: Negligence not associated with Condition of Premises

In *Slater v. Clay Cross*[1] and other English cases before the passing of the Occupiers Liability Act 1957, Denning L.J. (as he then was) had elaborated his theory that the licensee-invitee distinction had no place where the injury occurred not through the "static condition" of the premises but through "current operations" conducted thereon. Much the same result is achieved, though the phraseology employed is different, in relation to a *prima facie* trespass situation, by the recent decision of the High Court in *Rich v. Commissioner for Railways*.[2]

The situation in this case was that the plaintiff entered a railway level crossing by passing through a wicket gateway. Whilst on the crossing she tripped and fell and whilst prostrate was struck and injured by a passing train. By a railway by-law pedestrians were forbidden to enter the crossing and notification to that effect was given by a sign-board. At the trial the judge excluded certain evidence tending to show that pedestrians were accustomed to use the crossing without interference by the servants of the Railways Commissioner, the suggestion behind such evidence being that the plaintiff was a licensee or an invitee by implication.

The High Court did not find it necessary to decide whether the plaintiff was a trespasser or whether the evidence would be admissible to show some kind of implied licence or invitation. (Fullagar J. indeed said that he was prepared to regard her as a

1. [1956] 2 Q.B. 264. 2. [1959] A.L.R. 1104.

*B.A. (Oxon.), LL.M. (Qld.); Garrick Professor of Law in the University of Queensland; author of *Cases on Land Law*.

trespasser.) The strong possibility that the plaintiff was no more than a trespasser in legal analysis did not however in the view of the Court conclude the matter. The authorities of which *Indermaur v. Dames*[3] was the best-known example related only to the duty which arose from the mere fact of occupation of the premises. Such duty was a special duty which might co-exist with a general duty of care not related to the condition of the premises. The liability of the occupier *qua* occupier to a trespasser did not involve any special duty to take care. This fact however did not preclude the possibility of the existence of a general duty to exercise reasonable care for the safety of persons using the premises or being present thereon. To a case based on the allegation of the breach of such a duty the existence of a by-law such as the one here in point was not a conclusive answer.[4] The evidence should have been admitted because the fact that pedestrians habitually crossed the line was clearly a matter for the jury to take into account in considering whether the Commissioner should have done more than he did for the protection of such pedestrians. A new trial was accordingly ordered. Taylor and Menzies JJ., whilst agreeing that the trial went off on a wrong issue and that the evidence should not have been excluded, dissented from the order for a new trial on the ground that here there was no evidence of negligence fit to go to the jury.

Action for Loss of Services

This hardy annual has once more engaged the attention of the High Court. Its decision in *Commissioner for Railways (N.S.W.) v. Scott*[5] is particularly interesting because of the rejection by a majority of the High Court of the view adopted by the Court of Appeal in England in *Inland Revenue Commissioners v. Hambrook*[6] that the action *per quod servitium amisit* is limited to the menial or domestic type of employment. In this case the employee, the loss of whose services was in point, was an engine driver in the employ of the New South Wales Commissioner for Railways so that there was no question of the employment being of the domestic type. The majority (Kitto, Taylor, Menzies and Windeyer JJ.) thought that the action was not limited in the way in which the Court of Appeal thought it was. The historical analysis of Denning L.J. (as he then was) in the *Hambrook* case did not impress them. Although the action originated in times when most servants were in fact of the menial type and when the current conception was that a master had some kind of a proprietary interest in the services of his servant, the decisions did not show any narrowing of the action to the menial type of employment when servants began to

3. (1866) L.R. 1 C.P. 274.
4. *Henwood v. Municipal Tramways Trust* (1938) 60 C.L.R. 438.
5. [1959] A.L.R. 896.
6. [1956] 2 Q.B. 641.

be found outside the household. In fact, as Kitto J. points out, if the proposition that the form of action was limited to menial servants was well-founded, then every declaration in an action *per quod* of which any record has so far been brought to light, except for one eighteenth century case, must have been "obviously and strikingly" demurrable.[7]

Dixon C.J., who agreed with McTiernan and Fullagar JJ. that the action was subject to the limitation suggested, drew this inference, however, entirely from the recent English decisions. He thought that it was not a view that obtained in the seventeenth, eighteenth and nineteenth centuries; thus on the historical aspect he is at one with the majority justices.

The majority were further of the view—and in this they were supported by the learned Chief Justice—that the instant situation was one of a master-servant relationship. The engine driver was in the employment of the Commissioner for Railways; the relationship was not akin to that existing in the public service which was a relationship between the subject and the State. Here there was a relationship between individuals. This analysis served to distinguish the present situation from those existing in *Commonwealth v. Quince*[8] and *Attorney-General for N.S.W. v. Perpetual Trustee Co.*[9] without adverting to the further fact that these cases involved very special types of public employment.

In this brief note it is impossible to do more than refer to the view expressed by Fullagar J. in his dissenting judgment that in any event medical and hospital expenses incurred by the employer were not properly recoverable in an action for loss of services though they were recoverable from the defendant by any person who was under an obligation to pay them.[10] In a true action for a wrongful act *per quod servitium amisit* the measure of damages must be the pecuniary loss actually sustained through the deprivation of the services of the servant. Wages paid to the servant during incapacity did not necessarily represent that loss. Still less was it represented by the amount of a pension paid or medical expenses incurred.

Conspiracy: Industrial pressures: Illegal means

Two High Court decisions, coming, strangely enough, in the course of one year, bear on a topic which does not appear to have directly arisen in any previous case, viz. the question of civil liability for "conspiracy by illegal means". This phrase has been com-

7. [1959] A.L.R. at 910.
8. (1944) 68 C.L.R. 227.
9. (1952) 85 C.L.R. 237 and [1955] A.C. 457.
10. For the ramifications of this aspect see *Blundell v. Musgrave* (1956) 96 C.L.R. 73 and discussion by Assoc. Professor Parsons in 30 A.L.J. 618.

pendiously used to indicate a situation where the *motive* of the combination in the light of the formulation in the *Crofter Case*[11] is not involved but where it appears that either the end of the combination or the means employed to gain that end are specifically unlawful *per se*, in other words the acts done or intended to be done would be in some way legally wrong even if done by one individual. The learned law lords who delivered the judgments in the *Crofter Case* did indeed in sundry *dicta* except from their analysis the case where "unlawful" means were employed but cast no light on the meaning of "unlawful".[12] Textbook writers such as Citrine seem inclined to equate the word "unlawful" with "tortious"[13] but in this connection it has been said that where the means employed by the combiners constitute in themselves torts, then any allegation of conspiracy is surplusage.[14] The notion behind this seems to be that the combiners would be liable for the independent tort on the basis of it being an act committed in the course of a joint venture. This may well be so in many situations but it does not seem to cover the case where the combination is intended to and does injure A but the specific torts are committed against and injure B.

Be this as it may, there is the situation where the specific act committed is non-tortious but is criminal or is at least visited with some penal consequences. The question whether, where this result is involved, the combination is civilly actionable as a conspiracy is involved in both the High Court cases, somewhat equivocally in the one but quite clearly in the other.

In the *Hursey Case*[15], discussed from another viewpoint in the section dealing with Industrial Law, members and officials of the Hobart Branch of the Waterside Workers Federation, assisted by certain officials of the Federal body, had manifested their displeasure at the attitude of the Hurseys (respondents) by preventing the latter from answering their names at the wharf call-over on the days when assigned for work, through a human barrier barring access to the wharf pick-up point. The respondents on some occasions had endeavoured to push their way through; on other occasions they had contented themselves with appeals. On most occasions there was considerable abuse and name-calling and on some occasions threats. The respondents brought two actions in the second of which they alleged, *inter alia*, conspiracy. The High Court, upholding Burbury C.J. of the Tasmanian Supreme Court, held that, were there no other specific illegality, the respondents would fail on the *Crofter* principle as, although feelings were

11. *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] A.C. 435.
12. *Crofter Case, supra* at 445, 467.
13. Citrine, *Trade Union Law*, p. 420.
14. See e.g. *O'Brien v. Dawson* (1942) 66 C.L.R. 18 at 27.
15. *Williams v. Hursey* (1959) 33 A.L.J.R. 269.

exacerbated by the respondents' membership of a breakaway political group, the dominant group motive was to protect the principle of majority rule in union affairs so that the action taken could be described as taken *bona fide* to protect the combiners' interests as they saw them. They held, however, again agreeing with Burbury C.J., that here was a combination to act through means independently unlawful which therefore qualified as an actionable conspiracy. Whilst the three members of the Court who delivered separate judgments seemed to agree that the action of the barricaders constituted assault (as distinct from battery)[16] and therefore was of a tortious character, the decisive fact relied on by at least Taylor and Menzies JJ. was that the formation and conduct of the barrier constituted and involved statutory offences under the Stevedoring Industry Act,[17] and Menzies J. said "It is, I think, quite clear that an agreement to do something, either as an end or a means to an end, it being something that would, if it were done by an individual, be a criminal offence, is a tortious conspiracy if another suffers damage by reason of action pursuant to the agreement".[18]

Space does not permit consideration of the attitude of the High Court to the "walking off" tactics adopted by Federation members after the barricades had been ended by an interlocutory injunction by the Tasmanian Supreme Court, but no different principle seems to be involved therein. Menzies J. in fact thought that these tactics involved no statutory offence but he considered that the conspiracy was one combination which was actionable notwithstanding that some of the means adopted were not unlawful.

In *Coal Miners Industrial Union v. True*[19] the plaintiff had been invalidly suspended from union membership because of his refusal to contribute to a levy made to support a strike illegal under Western Australian law, and certain members of the union lodge covering workers at the mine where plaintiff was employed secured his dismissal from employment by a threat not to work if he was continued in employment. The case both in the Western Australian Supreme Court and on appeal to the High Court mainly turned on the question whether the union as well as the lodge members were liable for civil conspiracy and the question *why* the

16. Fullagar J. also appeared to regard interference with respondents' personal liberty and freedom of movement, though not amounting to false imprisonment, as constituting tortious conduct. It is submitted with respect that His Honour misconceived the nature of respondents' argument on the statutory offences; they were not suggesting that breaches of the Stevedoring Industry Act of themselves created a civil right of suit. They were relying on them in this connection as constituting "illegal means" as the basis of a conspiracy action.
17. Viz. preventing, hindering or dissuading a waterside worker by threats, intimidation or incitement.
18. 33 A.L.J.R. at 305.
19. (1959) 33 A.L.J.R. 224.

combination constituted an actionable conspiracy does not seem to have been argued.[20] Dixon C.J. however pointed out that the combination operated by means of a threat to call a strike illegal under Western Australian law[21] and said "A combination to threaten and if necessary carry out an unlawful act as a means of securing an end is actionable as a civil conspiracy. So much at least seems now to be conceded in all the welter of authority".[22]

This case clearly involves no intrusion of the element of independent *tortious* conduct as the conduct was criminal, or at least quasi-criminal, only. Its force, however, is blunted by the fact that the actionable quality of the combination as such seems to have been admitted.

EDWARD I. SYKES

20. The judgments in the Western Australian Supreme Court proceedings stressed the illegality of the levy and the invalidity of the plaintiff's expulsion from membership of the union, but neither seem to be relevant to the quality of the pressure taken to secure his dismissal from employment.
21. All strikes in Western Australia are illegal under the Industrial Arbitration Act of that State.
22. 33 A.L.J.R. at 227.