recent tendency [21] not to extend the area of tortious liability without fault is, for the present writer, a source of small regret. "For it does not seem consonant with current ideas of justice or morality that for an act of negligence however slight or venial . . . the actor should be liable for all consequences however unforseeable and however grave."[22]

B. H. McPherson, *

Occupiers and Trespassers.

The decision of the High Court in *Commissioner for Railways v. Cardy*[1] in recognizing the existence of a duty of care on the part of occupiers towards persons who on the traditional approaches of the common law would clearly be trespassers has done much to dispel the fog of unreality which has hung round the judicial approach to the question of entrants whose presence has not been licensed by the occupier but whom he has not been energetic enough to repel. It also contains a considerable assault on the view which by inferring a licence which did not exist treated persons as licensees who were really in fact trespassers.

The facts were not complicated. The New South Wales Commissioner for Railways owned and occupied a large area of about five hundred acres in the Sydney industrial suburb of Clyde. Part of this area was used as a dump on which was tipped among other debris ashes from the fire boxes of locomotive engines. In some cases the ashes would contain live and burning coals. The ashes had banked up but below the surface much of the material would remain in a smouldering condition. There was a road and certain tracks in the area which were open to pedestrians and led from streets on one side of the area to streets on the other. There was also evidence that people particularly children would diverge from the road and track to visit and fossick round the dump. There was also evidence of sporadic and intermittent warnings given by railway officials to keep off the dump and of occasions when officers would warn persons whom they found on the dump, such as children, to leave.

The plaintiff, a boy aged fourteen and a half years, wandered over the dump area and was severely injured when, going down a bank of ashes, his feet went through the surface and contacted the hot ashes underneath. The boy had played on the site years ago but had gone to live in the country and the day of the accident

21. Manifested in *Read v. Lyons* [1947] A.C. 156; *Fowler v. Lanning* [1959] 1 Q.B. 426.
22. [1961] 2 W.L.R. at p. 139.

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1. (1960) 32 A.L.J.R. 134, [1951] A.L.R. 16.

was the first occasion on which he had visited the dump since his return.

The action in the Supreme Court of New South Wales was fought on the basis that to succeed the boy would have to establish that he was on the premises with the leave and licence of the occupier and the trial judge directed the jury on the conventional lines. The jury brought in a verdict for the plaintiff and it was assumed on appeal to the High Court that they must have found that the plaintiff was a licensee and that the danger on the property was in the nature of a "concealed trap". An appeal to the Full Court of New South Wales from the decision was dismissed and the Commissioner appealed to the High Court which, with Menzies J. dissenting, dismissed the appeal.

McTiernan J. and the dissenting justice, Menzies J., were content to consider the problem on the orthodox approach of "license or no license", the former finding that the jury was justified in inferring a tacit permission, the latter concluding that assent could not be inferred from inadequate attempts to prevent trespassing. Windeyer J., whilst of the view that there was a wider duty transcending the special rules concerning the duties of occupiers towards entrants, also thought that as the authorities stood the matter could be put on the conventional basis that the plaintiff should be considered a licensee and on this basis the jury's verdict was sufficiently supported by the evidence.

In spite therefore of the long and careful analysis of Windeyer J. and his admirable analysis of the developments which led to qualifications of the rule that the trespasser came at his peril, the greatest interest lies naturally in the bolder approaches of Dixon C.J. and Fullagar J.

These two learned justices took the course, which might well appal the conventionally minded, of deciding the case on a legal basis which had not been litigated in the court below. Both faced the fact that the boy was in reality a trespasser; both found there was nonetheless a duty. Dixon C. J. regarded as purely fictional the attempt to convert a trespasser situation into one of licence by the doctrine of implied or imputed permission. The duty of the licensor was formulated on the assumption that by his voluntary act he gave consent to the presence of visitors on the land. Such a basis was absent when it was clear that if the question had been put to the occupier he clearly would not have consented to the presence of persons on the land even though the attempt he made to exclude them was half-hearted. In His Honour's view it was time to discard the fiction. The basis of the duty was not to be found in fictitious imputed consent but rather from a combination of circumstances *viz.* the dangers which attend the use of the premises,

the circumstances that the premises are to the knowledge of the occupier frequented and that in spite of the knowledge which the occupier has of the danger, he takes no precaution to safeguard the entrants from that danger. He thought that the basal principle to be invoked by no means involved the imposition upon occupiers of premises of a liability for want of care for the safety of trespassers. The rule remained that a man trespassed at his own risk and the occupier was under no duty to him except to refrain from intentional or wanton harm to him. However a duty existed where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril of which the persons so using the premises are unaware and which they are unlikely to expect or continues its existence.

The judgment of Fullagar J. is more explicit as to the source of the wider duty. He pointed out that the particular rules evolved as to the respective duties towards licensees and invitees were only relevant to the particular relationship of entrant-occupier; they did not abrogate the general law of negligence which might found a wider duty. Similarly the denial of any special "occupier" duty towards a trespasser did not mean that circumstances over and above the character of the occupier as a trespasser might not give rise to a general duty of care. This view of the matter follows on from the approach of the same learned justice in *Rich v. Commissioner for Railways*[2] but goes beyond it as the latter case might well have been described as one of "current operations". He found the basis of the wider liability in the instant case in the "neighbour" principle of Lord Atkin in *Donoghue v. Stevenson*.[3]

Whilst the views of Dixon C.J. and Fullagar J. involve a wide and flexible approach dependent upon the facts of each case it is obvious that the varieties of fact situation which could rise may in the future compel very careful analysis in judicial directions to juries. Are the limits to be set only by a principle of "foreseeability" or are they narrowed by a requirement that the danger must be one "actively created"? Is the occupier, who has temporarily to leave his house vacant, to be liable to idle folk who might come to pry and fossick around an apparently empty house or even indulge in some mild pilfering because he knows there is a danger there and that such people might well be likely to be attracted by the sight of an empty house? Are we to have classes of "good" trespassers and "bad" trespassers? Such questions are perhaps not quite answered by the consideration that the existence and measure of the duty must be determined by the circumstances of each case.

2. (1959) 32 A.L.J.R. 176. 3. [1932] A.C. 562.

It may be doubted whether the older rules applicable to the position of trespassers who were recognized as trespassers and not disguised as licensees, were quite so inelastic as many think. The older formulation recognised not only a duty to refrain from wilful injury to trespassers but also one not to act in reckless disregard of his presence. As Windeyer J. points out, in some of the cases "reckless disregard" has been interpreted as amounting to little more than lack of reasonable care.[4] It is true that the older formulation envisaged positive acts of misfeasance but the common law has furnished numerous examples of gradual expansion of earlier formulated principle. Such an approach may furnish more opportunities for wise judicial control than an application of a pure "foreseeability" test.

E. I. SYKES.*

TRUSTS

Non-Charitable Purpose Trusts.— The question whether a valid trust can be created for non-charitable purposes has now been definitively answered by the Court of Appeal in England in a judgment which is in complete accord with the recent decision of the Privy Council on appeal from the High Court of Australia in *Leahy v. Att. Gen. for New South Wales.*[1] In *re Endacott*[2] a testator gave his residuary estate to a parish council "for the purpose of providing some useful memorial to myself". It was argued that this was a valid charitable gift, or alternatively that it fell into that class of trusts for non-charitable purposes which, though not charitable, will nevertheless be enforced by the courts. The Court of Appeal rejected both contentions. It is with the second argument only that this note is concerned.

The leading principle is that a trust will be valid only if it is constituted for the benefit of individuals or for purposes which the law recognises as charitable. This rule has been expressed in numerous decisions, including *Morice v. Bishop of Durham*,[3] *Bowman v. Secular Society Ltd.*,[4] and *Leahy's Case*,[5] and was re-affirmed in the case under discussion. In the words of Lord Evershed M.R., "no principle perhaps has greater sanction or authority behind it

4. As in *Mourton v. Poulter* [1930] 2 K.B. 183; *Addie v. Dumbreck* [1929] A.C. 358.

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1. [1959] A.C. 457.
2. [1960] 1 Ch. 232.
3. (1804) 9 Ves. 399, 405 (Grant M.R.).
4. [1917] A.C. 406, 441 (Lord Parker of Waddington).
5. *Op. cit.*, at pp. 478-9.