If not, then it seems to resemble a testamentary, rather than a non-testamentary document. Such considerations were thought to be overstated, for in his judgment, Pape J. said, 'Indeed, too much emphasis has been placed upon what might have occurred, and not enough upon what has in fact occurred'.[17]

It may, however, be possible to offer a short solution to the whole problem. Since according to its terms the Wills Act operates to give power to dispose of property by will, it may have been possible to argue that compliance with the requirements of the Wills Act was unnecessary on the alternative ground that this was not a disposition of property. The obligations which it called into being were contractual and not executorial in nature. This may be seen by applying the tests laid down in *Ashby v. Commissioner of Succession Duties (S.A.)*[18] by Starke J. This case concerned a covenant to pay money as interest on a loan, and the issue was whether it constituted a 'disposition of property' and was thus liable to succession duty. He said, 'The covenant created a liability to pay a sum of money; no property of any description whatsoever passed by force of the covenant; no property accrued to any person by its force, and no charge was created over any property. The covenant did not diminish the property of the covenantor; he was possessed of the same property after the making of the covenant as he was before.'[19] As a result, he held that it was not a disposition of property and, with respect, it is submitted that the same can be said of this indenture.

The effect of this decision may be to give a helpful precedent to persons placed in a similar situation to that of the Beyer family (shareholders in a small family company who wish to continue and consolidate their control over the company and to avoid many of the problems caused by the death of a major shareholder). But there is a very definite gap in the protection afforded by such a covenant, for although no express power of revocation was, or could have been given, it may be effectively avoided by a unilateral act of the covenantor, such as a sale or other disposition of shares in his lifetime.

MARY E. HISCOCK

RICH v. COMMISSIONER FOR RAILWAYS[1]

Occupier's liability—Duty irrespective of status of person injured—Breach of by-law as defence

R was injured whilst crossing a railway line: she did not use a footbridge although one was provided, and although a by-law under section 66 of the Government Railways Act 1912-1952 (N.S.W.) made it an offence to cross a railway line on foot when a footbridge was provided. She crossed the line near a car-crossing where she stumbled, and before she got up, she heard the whistle of a train. Although she saw the train and

[17] [1960] V.R. 126, 129. [18] (1943) 67 C.L.R. 284. [19] *Ibid.* 290.

[1] (1959) 33 A.L.J.R. 176; High Court of Australia; McTiernan, Fullagar, Taylor, Menzies and Windeyer JJ.

attempted to move off the line, she miscalculated the distance she ought to have moved for safety, and so was struck and injured.

The trial judge rejected evidence that it had been customary for people to cross the railway line on foot, and directed the jury to find for the defendant, as the plaintiff had not tendered sufficient evidence to support a finding that she was an invitee.

The High Court dealt largely with the effect of the by-law concerned. The main judgments were given by Fullagar and Taylor JJ.

Fullagar J. held that although the by-law made R *prima facie* a trespasser, yet the fact that the occupier had permitted continual trespasses over the railway line could be evidence of tacit licence;[2] however, it was not necessary to decide whether the appellant had been a licensee, for even if she were, there would have been no breach of duty to her in this capacity. It is interesting to note that Fullagar J. referred with apparent approval to recent decisions of the Court of Appeal which concern the duty owed to a licensee and show how wide this duty can be.[3] Nevertheless, this did not dispose of the issue. Fullagar J. held:

> As was pointed out in *Mummery v. Irvings*,[4] the duty which the occupier of premises as such owes to invitees or licensees present on the premises is a separate and distinct duty, which arises from the mere fact of the occupation of the premises, and relates only to the condition of the premises. There may co-exist with that special duty a general duty of care, which is not related to the condition of the premises, and which arises not from the fact of occupation but from the general circumstances of the case.[5]

In terms of such a duty it would obviously be relevant whether the Commissioner of Railways knew or ought to have known that people often walked by foot across the lines. Thus the evidence which the trial judge had rejected was wrongly rejected.

On this matter the High Court was unanimous and the members cited ample authority.[6]

Perhaps the oldest and highest authority is the decision of the House of Lords in *Excelsior Wire Rope Co. Ltd v. Callan.*[7] In this case the principle was very clearly set out, although some difficulty may be found in distinguishing the decision on the facts from *Robert Addie & Sons*

[2] *Phipps v. Rochester Corporation* [1955] 1 K.B. 450.

[3] *Coates v. Rawtenstall Corporation* (1937) 157 L.T. 415; *Pearson v. Lambeth Borough Council* [1950] 2 K.B. 353; *Hawkins v. Coulsdon and Purley U.D.C.* [1954] 1 Q.B. 319.

[4] (1956) 96 C.L.R. 99. [5] (1959) 33 A.L.J.R. 176, 178.

[6] In Australia, *Transport Commissioners (N.S.W.) v. Barton* (1933) 49 C.L.R. 114, *Thompson v. Council of the Municipality of Bankstown* (1953) 87 C.L.R. 619, *Mummery v. Irvings Pty Ltd* (1956) 96 C.L.R. 99. In England, there is considerable authority, it being necessary only to mention *Excelsior Wire Rope Co. v. Callan* [1930] A.C. 404 and *Mourton v. Poulter* [1930] 2 K.B. 183.

It is to be noted in the present case that McTiernan J. relied partly upon *The King v. Broad* [1915] A.C. 1110, but this case, although very important in the field of occupier's liability, deals really with the question of who is an occupier under the rules in *Indermaur v. Dames* (1866) L.R. 1 C.P. 274 and in *Gautret v. Egerton* (1867) L.R. 2 C.P. 371. [7] [1930] A.C. 404.

(Collieries) Ltd v. Dumbreck.[8] In the *Excelsior Wire Rope* case, the action was brought on behalf of two children who had been injured by part of a haulage system which was set in operation whilst they were playing on it. They were trespassers, but their presence could have been foreseen, since there had been many cases of similar trespasses in the past. The House of Lords unanimously upheld the children's claim, and expressly dismissed the question whether they were licensees or trespassers. This did not matter because, whatever their status might have been, there had been a breach of duty towards them. One cannot show a reckless disregard for a person's safety merely because one has not given him permission to enter premises; his status is an entirely different matter which is, indeed, only relevant where the actual *state* of the premises is concerned.

This principle has been applied in other cases: by the Court of Appeal in *Mourton v. Poulter,*[9] where a falling tree hit a child; in *Dunster v. Abbott,*[10] where Denning L.J. was prepared to find that the turning-off of a light illuminating a road fell in this category; and in *Thompson v. Council of the Municipality of Bankstown,*[11] where the majority of the High Court of Australia held that the passage of electricity did not relate merely to the state of premises.

In the present case, Taylor J. considered another matter in detail. In *The King v. Broad,*[12] Lord Sumner expressly stated that breach of this type of by-law was conclusive proof of contributory negligence. Since the Wrongs (Contributory Negligence) Act 1951 (N.S.W.) this has no longer been of the same importance. But in this case, it was contended that since R was injured through doing something prohibited and illegal, she was then still entitled to recover, if the defendant were negligent. In England the only authority is the judgment of Lord Asquith in *England v. National Coal Board,*[13] the other members of the House of Lords having decided the matter on a different ground. But in Australia it is settled by *Henwood v. Municipal Tramways Trust (S.A.)*[14] where an analogy was shown between this class of cases and those where the imposition of a statutory duty gives a correlative civil right to a certain class. Taylor J. approved the principles set forth in that case, to the effect that no penal provision in a statute should receive an operation which deprives a person offending against it of a private right of action which, in the absence of such statutory provision would accrue to him, unless the statute imposing the penalty itself deprives him of that right.

Taylor and Menzies JJ. considered that the evidence suggested such carelessness on the part of the plaintiff, combined with unforeseeable circumstances, that she could not show a breach of the duty owed her by the defendants. Nevertheless, the majority considered that the plaintiff was entitled to a new trial, on the ground of the trial judge's misdirection.

I. C. F. SPRY

[8] [1929] A.C. 358. [9] [1930] 2 K.B. 183. [10] [1954] 1 W.L.R. 58.
[11] (1953) 87 C.L.R. 619. [12] [1915] A.C. 1110. [13] [1954] A.C. 403.
[14] (1938) 60 C.L.R. 438, and see also on this point, *Phillips v. Britannia Hygienic Laundry Co. Ltd* [1923] 2 K.B. 539.