1928
*Feb. 15.
*Mar. 5.

ROBERT J. GLENN AND EDGAR E. BABB (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES J. SCHOFIELD (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Animals—Open Wells Act, Sask. (R.S.S. 1920, c. 169, as amended 1924-25, c. 43), s. 4—Obligation not to store threshed grain "accessible to stock" of other persons, lawfully running at large—Extent of responsibility—Horses injured by eating wheat that had run from granary reasonably fit for storing grain.*

The words "accessible to stock" in s. 4 of *The Open Wells Act*, Sask., which enacts that "no person shall have or store on his premises * * * any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises when lawfully running at large," construed with due regard to the provisions of the statute as a whole and the mischief it was intended to remedy, have a qualified meaning and call only for such protection of stored grain as is reasonably fit to prevent access to it by stock.

It was held that defendants were not liable for damages for injury to plaintiffs horses (while lawfully running at large) caused by eating wheat which had run from a granary on defendants' premises, in view of the jury's finding that the granary was reasonably fit for storing the wheat as against animals running at large; which finding this Court, having regard to the evidence, refused to reverse.

Judgment of the Court of Appeal for Saskatchewan (21 Sask. L.R. 494) reversed.

APPEAL by the defendants (by leave granted by the Court of Appeal for Saskatchewan (1) ) from the judgment of the Court of Appeal for Saskatchewan (2), which reversed the judgment of Brown C.J. (rendered upon answers by the jury to certain questions submitted) dismissing the plaintiff's action, which was brought, under *The Open Wells Act*, Sask. (R.S.S., 1920, c. 169, as amended by c. 43 of the Statutes of 1924-1925), for damages for injuries to plaintiff's horses (while lawfully running at large) through eating grain which had run from a granary on the defendants' premises. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Smith JJ.

(1) (1927) 21 Sask. L.R. 597.

(2) 21 Sask. L.R. 494; [1927] 2 W.W.R. 183.

*E. M. Hall* for the appellants.

*C. E. Gregory K.C.* for the respondent.

The judgment of the court was delivered by

SMITH J.—On December 28, 1925, the respondent's horses, while running at large lawfully under the provisions of the statute in that behalf, strayed on lands in Saskatchewan owned by the appellant Babb, of which the appellant Glenn was tenant, and ate a quantity of wheat that had run from a granary on the land, with the result that one died, and others were injured. The grain was stored in a granary attached to a building on the premises, which granary was 6 feet wide, 18 feet long, 6 feet high at the low side and 8 feet high at the high side. It was built on 2 by 6 inch joists, with studding 2 by 4 inches, 3 feet apart, to which was nailed a sheathing of inch tongued and grooved boards 6 inches wide, which, with the roof, enclosed the grain.

The respondent claims damages against both appellants by virtue of the *Open Wells Act*, R.S.S., 1920, c. 169, as amended by c. 43 of the Statutes of 1924-1925, s. 4 of which is as follows:

> No person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises when lawfully running at large.

"Stock," as defined in the Act, includes horses, as well as other domestic animals.

The jury answered questions as follows:

(1) Were the horses damaged as a result of eating wheat from the granary in question? Answered Yes.

(2) Was the granary reasonably fit for the purpose of storing said wheat as against animals running at large? Answered Yes.

(3) Did the horses get the grain because the granary was not reasonably fit for that purpose? Answered No.

On these answers the trial judge dismissed the action. The Court of Appeal set this judgment aside, and directed judgment to be entered for the plaintiff for damages to be assessed with costs in the court below and costs of the appeal.

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The whole question turns on the construction to be placed on the words "accessible to stock" in the section quoted. In the reasons for judgment in the Court of Appeal, the opinion is expressed that it would have been a good defence to the action if it had been shown that the grain became accessible to the horses by the act of God or the King's enemies or by the act of a third party for whom the appellants were not responsible. Respondent's counsel did not combat this view, which to my mind is correct as far as it goes. The section, then, does not impose a duty absolutely to prevent access under all circumstances, so that the words "accessible to stock" must be read with qualifications. The real meaning to be attached to the words must be arrived at by consideration of the mischief that the statute was intended to remedy and the provisions of the statute as a whole, in addition to the particular language of the section in question. An enactment made it lawful for stock to run at large without the owner being liable for trespass to the owners or occupiers of lands on to which the stock might stray. This made it necessary to impose on owners and occupiers of lands to which the stock might stray the obligation of preventing it from being injured or destroyed by the obvious dangers of open wells or excavations or grain exposed to be eatent to excess. S. 3 of the Act provides that no person shall have on his premises any open well or dangerous excavation "accessible to stock," and s. 5 provides that, in proceedings to recover any penalty for the violation of any of the provisions of the Act, it shall be a sufficient defence thereto if it be shown that such well, excavation or grain was kept enclosed by a lawful fence as defined by *The Stray Animals Act*, so that the well, excavation and grain are not to be considered "accessible to stock," if enclosed by such a fence.

A lawful fence is defined as a substantial fence, not less than 3½ feet high, of woven wire secured to posts not more than 33 feet apart, or of four barbed wires on such posts fastened to droppers not more than 7½ feet apart, or of three barbed wires on posts not more than 16½ feet apart, or of rails, boards or slabs not less than five in number, the lowest not more than 12 inches from the ground, securely nailed or fastened to posts not more than 16½ feet apart, and of one barbed wire at or near the top. A fence sur-

rounding growing crops or in process of being harvested is to be at least eight feet from the crop, and a fence surrounding stacks of hay or grain is to be at least twenty feet from the stacks.

No one would seriously argue that such fences would at all times and under all circumstances keep all stock of the kind defined from access to wells, excavations, hay or grain. At most, such fences would ordinarily prevent such access, and are what the Legislature regarded as reasonably fit for the purpose. This indicates the limited sense in which the words "accessible to stock" are used throughout the statute, and there is no reason, in my opinion, for giving them a wider meaning in s. 4 than elsewhere. It could not have been contemplated by the Legislature that such a fence would be the only protection for threshed grain. In s. 4 there is no particular description of the protection required, beyond the provision that the grain is not to be "accessible to stock"; but under s. 5 it will not be deemed accessible if protected by such a fence, which fence, as I have pointed out, would only be reasonably fit to prevent access.

It is, I think, highly unlikely that the Legislature intended to impose on the storer of grain in the ordinary way in a closed building or granary the obligation to insure other people's stock against access to it under all circumstances except where same should arise from the act of God, the King's enemies or of third persons, and at the same time intended to exempt him from liability if his grain were stored in the open, protected only by a fence such as described.

Reading the statute as a whole, I am of opinion that it is clearly indicated that the phrase "accessible to stock" in s. 4, has a qualified meaning, and calls for only such reasonable protection against access by stock to stored grain as men of ordinary sense would judge to be reasonably fit to prevent access to it by stock. In this I am in accord with the views expressed by the learned trial judge in his charge to the jury and expressed by Mr. Justice Elwood in *Hill* v. *Mallach* (1), cited in the appellant's factum.

(1) [1918] 1 W.W.R. 10.

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The respondent urges us to hold that the jury was unreasonable in finding, in answer to the second question, that the granary was fit, and points out that the learned trial judge has intimated that he would probably have come to a different conclusion. The plaintiff endeavoured to prove that the granary was old, rotted and unfit. The defendant offered evidence that he had had it repaired by two men immediately before placing the grain in it, and these men swore that they had put it in good repair and that it was fit. There was also evidence offered that the boards had been battered by the horses' hoofs. On this contradictory evidence, the jury has made a finding that the granary was reasonably fit for the purpose of storing wheat as against animals running at large, and it is clear that this Court would not be warranted in reversing this finding. There is no finding as to the precise cause of the horses obtaining access to the grain. There was no evidence as to holes having been eaten in the boards by vermin. The finding that the granary was reasonably fit negatives the suggestion that the pressure of the grain sprung the boards. In view of the evidence as to hoof marks on the boards, it seems probable that the jury concluded that the horses knocked the boards off with their hoofs, and that, having regard to the condition of the granary and the way in which the boards were nailed on, they would not ordinarily be knocked off in that way. With great deference I am, therefore, of the opinion that the appeal should be allowed with costs of this appeal and of the appeal below, and that the judgment at the trial should be restored.

*Appeal allowed with costs.*

Solicitors for the appellants: *Hearn & Hall.*

Solicitor for the respondent: *H. L. Cathrea.*