[HIGH COURT OF AUSTRALIA.]

McKELL AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

RIDER . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 23, 24.

Griffith C.J., O'Connor and Higgins JJ.

Health Act 1890 (*Vict.*) (*No.* 1098) *secs.* 216*, 222—*Nuisance—Common nuisance—Chimney sending forth smoke—Defence—Fireplace or furnace constructed to consume smoke as far as practicable.*

On a prosecution under sec. 222 of the *Health Act* 1890 (Vict.) charging that by the sufferance of the defendants a nuisance within the meaning of sec. 216 of the Act arose, viz., a chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance, it is not a defence that the fireplace or furnace connected with such chimney is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and

* Sec. 216 of the *Health Act* 1890, so far as material, is as follows :—

"For the purposes of this Part of this Act.—

. . . . . .

"(7) Any fireplace or furnace whether constructed before or after the passing of this Act which does not as far as practicable consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill factory dye-house brewery bakehouse or gaswork, or in any manufacturing or trade process whatsoever ; and any chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance :

. . . . . .

"Shall be deemed to be a nuisance and shall be liable to be dealt with in manner provided by this Part of this Act. Provided—

. . . . . .

"Secondly. That where a person is summoned before any court in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the court shall hold that no nuisance is created within the meaning of this Part of this Act, and dismiss the complaint, if it be satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has for that purpose been carefully attended to by the person having the charge thereof."

that such fireplace or furnace has for that purpose been carefully attended to by the person having the charge thereof.

The word "nuisance" in the phrase "sending forth smoke in such quantity as to be a nuisance," in sec. 216 (7) means a common nuisance.

Judgment of *Hood* J., (*Rider* v. *McKell*, (1908) V.L.R., 110; 29 A.L.T., 77), affirmed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Prahran an information was heard whereby Henry Rider, City Inspector of the City of Prahran, proceeded against John McKell and Abraham Baxter, trading as the Australian Gas Retort and Firebrick Manufacturing Company, for that, between 13th June 1907 and the date of the information, at Toorak Road in the municipal district of Prahran, by the sufferance of the defendants a nuisance within the meaning of sec. 216 of the *Health Act* 1890 arose, such nuisance being a chimney (not being a chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance.

From the evidence it appeared that the defendants carried on the business of brick manufacturers in a neighbourhood which was thickly populated; and that during the period in question large volumes of smoke were every day emitted from a chimney of their factory. Several residents near the factory deposed that linen hung out to dry was soiled and damaged, that it was consequently often necessary to wash linen two or three times, that their houses inside and outside were fouled with smuts, that they had sometimes to keep their houses shut and could not get fresh air, and that the smoke was worse at night than in the day time. This evidence was corroborated by the informant who also said that the smoke on certain days was so thick that "you could scarcely walk through it."

At the close of the evidence for the prosecution, counsel for the defendants tendered evidence that the fireplaces or furnaces were properly constructed so as to consume as far as practicable the smoke, and that the fireplaces or furnaces had been carefully attended to. This evidence was objected to by counsel for the informant, and the magistrates refused to receive it. No evidence

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was given by the defendants. The magistrates having convicted the defendants, they obtained an order nisi to review, which was discharged by *Hood* J.: *Rider* v. *McKell* (1).

From this decision the defendants now by special leave appealed to the High Court.

Mitchell K.C. and *Schutt*, for the appellants. The evidence was properly admissible under the second proviso to sec. 216 of the *Health Act* 1890. That proviso is intended to relate to a prosecution for a nuisance consisting of a chimney sending forth smoke, as well as to a nuisance consisting of a fireplace or furnace which does not as far as practicable consume its smoke. A great majority of the chimneys there referred to are connected with, and carry the smoke away from, the fireplaces and furnaces there mentioned. And the protection given by the proviso should be available to persons charged in respect of chimneys just as to persons charged in respect of fireplaces and furnaces. They referred to *Ex parte Schofield* (2); *Cooper* v. *Woolley* (3); 38 & 39 Vict. c. 55, sec. 91. The word "nuisance" in the clause "sending forth smoke in such quantity as to be a nuisance," means a common nuisance, and not a private nuisance. If that be so, there is no evidence here of a common nuisance, but merely of a private nuisance. *Harris's Principles of Criminal Law*, p. 155; *Stephen's Digest of Criminal Law*, 5th ed., p. 140; *R.* v. *Lloyd* (4). The smoke must be injurious to the general health of the public to constitute a common nuisance: *R.* v. *Davey* (5); *Great Western Railway Co.* v. *Bishop* (6).

[GRIFFITH C.J. referred to the *Criminal Code* (Qd.) sec. 230, as to the meaning of a common nuisance.]

The decision in *Weekes* v. *King* (7), that the second proviso only applies to the nuisance consisting of a fireplace or furnace which does not as far as practicable consume its smoke, is distinguishable by reason of the differences between sec. 91 of the English *Public Health Act* 1875 (38 & 39 Vict. c. 55), on which it was decided, and sec. 216 of the *Health Act* 1890.

(1) (1908) V.L.R., 110; 29 A.L.T., 77.
(2) (1891) 2 Q.B., 428.
(3) L.R. 2 Ex., 88.
(4) 4 Esp., 200.
(5) 5 Esp., 217.
(6) L.R. 7 Q.B., 550.
(7) 15 Cox., Cr. Ca., 723.

The nuisance consisting of a chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance, should be limited to chimneys not being chimneys "used for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever."

Starke (with him *MacFarlan*), for the respondent. The word "nuisance" in the phrase "sending forth smoke in such quantity as to be a nuisance," no doubt means a common nuisance. But it is not necessary that it should be injurious to the public health: *Gaskell* v. *Bayley* (1); it is sufficient that it should interfere with the comfort of persons living in the neighbourhood: *Banbury Urban Sanitary Authority* v. *Page* (2); *Bishop Auckland Local Board* v. *Bishop Auckland Iron and Steel Co.* (3). A nuisance created by Parliament might be the subject of indictment; *R.* v. *Neil* (4); *Archbold's Criminal Pleadings*, 22nd ed., p. 1121.

[O'CONNOR J. referred to *R.* v. *Crawshaw* (5).

GRIFFITH C.J. referred to *R.* v. *Gregory* (6).]

The clause relating to fireplaces and furnaces may be for the benefit of persons employed in factories. The second proviso is a definition of what the words "as far as practicable" mean.

GRIFFITH C.J. Sec. 216 of the *Health Act* 1890 provides that for the purpose of Part X. of the Act certain things shall be deemed to be nuisances. The 7th category is:—"Any fireplace or furnace whether constructed before or after the passing of this Act which does not as far as practicable consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill factory dyehouse brewery bakehouse or gaswork, or in any manufacturing or trade process whatsoever; and any chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance." There are two provisoes to that section, the second of which is:—"That where a person is

(1) 30 L.T., N.S., 516.
(2) 8 Q.B.D., 97.
(3) 10 Q.B.D., 138.
(4) 2 C. & P., 485.
(5) Bell C.C., 303.
(6) 5 B. & Ad., 555.

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summoned before any Court in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the Court shall hold that no nuisance is created within the meaning of this Part of this Act, and dismiss the complaint, if it be satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has for that purpose been carefully attended to by the person having the charge thereof." The section is taken from sec. 91 of the English *Public Health Act* 1875 (38 & 39 Vict. c. 55) with slight variations, the only variations, so far as now material, being that in the clause, "any chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance," the word "black" is inserted in the English Act before the word "smoke," and that that clause is in the English Act printed as a separate paragraph instead of running on after the preceding words. It was suggested before us that the change in the collocation made the concluding words "sending forth smoke in such quantity as to be a nuisance" operate as a qualification of the whole category, but the grammatical construction precludes the adoption of that argument.

The appellants were charged with the offence, which is created by sec. 222, of being persons by whose sufferance a nuisance within the meaning of sec. 216 arose and continued, the nuisance being a chimney (not being a chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance.

Before the magistrates there was evidence sufficient to warrant the conclusion that the appellants had committed a nuisance at common law by sending out smoke from their chimney, but they claimed to be entitled to the benefit of the second proviso, and to show that they had used in their works a fireplace constructed in such a manner as to consume as far as possible, having regard to the nature of their manufacture or trade, all smoke arising therefrom, and that their fireplace had been for that purpose carefully attended to by the person having charge thereof. The

evidence was rejected, and, upon appeal to the Supreme Court, *Hood* J. held that it was rightly rejected.

The main contention of the appellants is that that proviso should be held to apply to a charge of suffering the nuisance consisting of a chimney sending forth smoke in such quantity as to be a nuisance as well as to a charge of suffering the other nuisance. A similar question was raised in England in the case of *Weekes* v. *King* (1), and the Court was of opinion that the offence of keeping a fireplace which does not as far as practicable consume the smoke, and the offence of keeping a chimney, which sends forth black smoke in such quantity as to be a nuisance, are two separate offences. The construction of the language is not altered by the omission of the word "black." That decision, given in 1885, has never since been reviewed, although it is said that an ineffective attempt was made to review it. I can see no reason to doubt the correctness of that decision.

The Court pointed out that there were really two distinct offences, one that of committing a nuisance by means of a chimney sending forth smoke, and the other failing to consume smoke as far as practicable. The word "nuisance" in the Act must, I think, be read as meaning a nuisance according to the definition of that term at common law—an indictable nuisance. In this case, as I have said, there was ample evidence to show that the smoke constituted such a nuisance.

The second proviso is carefully framed to deal with the first part of clause (7), which in constituting the offence uses the words "as far as practicable." Now those words are ambiguous. It may be contended—as I have known it held by a Judge—that they mean as far as is mechanically practicable, or that they mean practicable having regard to the nature of the purpose for which the fireplace or furnace is used—that is, practicable for carrying on the business. The legislature, in order to prevent any difficulty of that sort from arising, laid down that besides the two elements which obviously go to constitute practicability—that is, the construction of the fireplace and proper attention being paid to it—there should also be taken into consideration a third element, namely, the purpose for which it was used; and that is

(1) 15 Cox Cr. Ca., 723.

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all they did by the proviso. That proviso has no reference to an act such as that complained of here, which is itself a nuisance at common law. There was no reason to protect a person who had offended against the common law. He might have been indicted for the offence. But this Act purported to give more complete and summary methods of suppressing nuisances. The English Statute law at first only contained provisions for the abatement of nuisances. Afterwards summary proceedings for that purpose were added. In the *Health Act* 1890 both those results are provided for in the same Statute. The effect of the provision for summary punishment is not to alter the character of an act which is a nuisance, but is to provide a more summary remedy. In this case it was necessary for the prosecution to establish that the emission of smoke was a nuisance at common law. Having done so, the Act declares that the defendants, in suffering that omission to take place, were suffering a nuisance for the purpose of the Act, and were liable to be dealt with in a summary way. The failure to consume smoke as far as practicable is also declared to be a nuisance for the purpose of the Act. That might or might not be a nuisance at common law, but whether it was or not, is immaterial for the purpose of the Act provided it comes within the language of the section. A similar provision is to be found in sub-sec. (2) of the section which provides that:—"any cesspool or other receptacle for night-soil which is not perfectly water-tight shall be deemed to be a nuisance."

For these reasons it appears to me that the appellants were not entitled to rely on the proviso, and that the evidence which they offered was properly rejected. The conviction was therefore right, and the appeal should be dismissed.

O'CONNOR J. I am of the same opinion. I do not think it necessary to add anything.

HIGGINS J. I concur.

Appeal dismissed.

Solicitors, for the appellants, *Upton & Plant.*
Solicitor, for the respondent, *D. H. Herald.*

B. L.