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I think that that matter is of little importance so long as we show by the insertion of the words "if any," as my colleagues propose, that we do not commit ourselves to the view that there is any dower.

Appeal dismissed. Judgment affirmed with variation of order by adding "if any" after "right of the widow to dower." Appellants to pay respondent Kitching's costs of appeal.

Solicitor, for the appellants, *Arthur G. Jenkins*, Perth.

Solicitors, for the respondent Pead, *R. S. Haynes & Co.*, Canning.

Solicitors, for the respondent Kitching, *Parker & Parker*, Perth.

N. McG.

[HIGH COURT OF AUSTRALIA.]

WILSHIRE AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

THE GUARDIAN ASSURANCE COMPANY LIMITED . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912. PERTH, *Nov.* 5, 6, 11. Griffith C.J., Barton and Higgins JJ.

Appeal—Practice—Fact—Undisputed questions of—Unreasonable finding of jury—Duty of Court of Appeal—Supreme Court Rules 1909 (*W.A.*), *Order XXXVIII., r.* 10.

If upon the undisputed facts a jury, properly understanding the case, could not reasonably have found a verdict for the plaintiff, it is the duty of the Court of Appeal under Order XXXVIII., r. 10, of the *Supreme Court Rules* 1909 (W.A.) to enter judgment for the defendant.

At the trial of an action against an insurance company upon a fire insurance policy which contained a condition that the insurance was to cease to attach, unless before the occurrence of any loss or damage the company's written sanction was obtained, if the nature of the occupation of the property insured was changed so as to increase the risk of loss or damage by fire, the jury found that, although there had been a change in the nature of the occupation of the property without the sanction of the company, the change had not been such as to increase the risk of loss or damage by fire; and judgment was entered for the plaintiffs. On appeal to the Full Court this judgment was reversed on consideration of the undisputed facts.

Held (*Higgins* J. dissenting), that the principle above stated applied to this case, and that, therefore, the Full Court was right in entering judgment for the defendant company.

Per Higgins J.—On the true construction of the policy, it was not enough to show that the introduction of fireplaces and fire increased the risk of fire; the true question was, did the change from the business of storage, no matter what is stored, to the business of wool-scouring, increase the risk of loss by fire; and it was not shown that the jury could not have honestly and intelligently found that it did not.

Appeal from the Supreme Court of Western Australia dismissed.

APPEAL from the Supreme Court of Western Australia.

The appellants, Wilshire and Feely, brought an action against the respondents, The Guardian Assurance Co. Ltd., to recover a sum of money alleged to be due to them under a policy of insurance whereby the company insured them against loss or damage by fire in respect of a certain building and the machinery therein —such building and machinery having been destroyed or damaged by fire. The policy of insurance contained and was subject to various conditions, of which the ninth was as follows:—"Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured before the occurrence of any loss or damage obtains the sanction of the company signified by indorsement upon the policy by or on behalf of the company:—(*a*) If the trade or manufacture carried on be altered or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire. (*b*) If the building insured or containing the insured property become unoccupied and so remain for a period

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of more than thirty consecutive days. (*c*) If property insured be removed to any building or place other than that in which it is herein stated to be insured. (*d*) If the interest in the property insured pass from the insured otherwise than by will or operation of law." When the appellants insured the building it was used by them as a bulk store, and at that time cement and machinery were stored there. The roof and walls were of galvanized iron, the uprights and framework of jarrah, which, according to the evidence, is a very hard wood to burn, and the floor was of concrete. The appellants, some time after the insurance was effected, leased part of the building, and the lessees used it as a wool-scouring establishment. For the purpose of wool-scouring, brick fireplaces with iron flues going through the walls were built into the premises. In these fireplaces fires were kept burning night and day, and, as the evidence showed, without anyone attending to them in the night-time. It was also shown in evidence that inflammable materials, such as wool, wooden wool-presses and sheeting for drying the scoured wool on, were kept on the premises for the purposes of the wool-scouring business. The premises were burned down, but it was shown that the fires had not been lighted for two nights previous to the date of the fire, and that the fire did not originate in that part of the premises used for the wool-scouring business. No notice of the change in the nature of the occupation of the building had been given to the company. Under these circumstances, at the trial of the action before *Rooth* J. and a jury, his Honor put the two following questions to the jury :—(1) Was there a change in the nature of the occupation ? and (2) If so, did the change increase the risk ? The jury answered the first question in the affirmative, and the second in the negative, and his Honor gave judgment for the plaintiffs.

The company having appealed to the Full Court, such judgment was set aside, and judgment entered for the company.

From this decision, the plaintiffs now appealed to the High Court.

Moss K.C. and *Dwyer*, for the appellants. The onus of establishing the defence lay upon the company, and they commenced

before the jury: *McGillivray on Insurance Law*, p. 365. This is not in conflict with the case of *Imperial Fire Insurance Co.* v. *Coos County* (1), when the whole of that case is considered. The company were only aiming at the risk being in any way increased. It is the use of fireplaces, not the fact of fireplaces being there, that increases the risk. The whole of the case at the trial centred round the point whether what was done increased the risk. It was for the company to satisfy the jury that the plaintiffs had not fulfilled all the conditions: *Gorman* v. *Hand in Hand Insurance Co.* (2). All the facts as to the structure and use of the building were before the jury, and it was for them to say if the risk had been increased: *Sampson* v. *Sampson* (3).

Northmore K.C. and *Stawell*, for the respondents. This policy was over a building which was being used for storing cement, machinery, &c., and it could not without the company's sanction have been used for storing dangerous substances. The presence in these stores of inflammable materials must necessarily have increased the risk of fire to some extent, unless the building was absolutely fireproof; and that it was not absolutely fireproof is shown by the fact that it was burnt down.

Moss K.C., in reply.

Cur. adv. vult.

The following judgments were read:—

November 11.

GRIFFITH C.J. When a building with iron walls and roof and cement floor, used as a bulk store, *i.e.* as a mere place of deposit and storage of goods, and having in it no fireplaces or flues, is converted into a wool-scouring establishment, and for the purpose of that business several fireplaces with 400 gallon boilers are built in it at a distance of two feet from the walls, with flues going through the walls, in which fireplaces fires are kept burning night and day without attendance in the night-time, and the appliances and materials used in carrying on the business are of an inflammable character, is the risk of loss or damage to the

(1) 151 U.S., 452.

(2) Ir. R. 11 C.L., 224, 231.

(3) 13 C.L.R., 338.

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Griffith C.J.

building by fire increased by the change in the nature of the occupation? Or, in other words, is the risk of loss or damage by fire to a building in which such a business is carried on in such a way greater than if the same building, having neither fireplaces nor flues, were used as a place of deposit for goods? That is the question propounded to us for answer. To the ordinary mind it would seem to answer itself. But a jury have answered it in the negative, and we are asked to say that they may have been right.

The policy upon which the plaintiffs sue describes the building as I have first stated, and was made subject to a condition by which the insurance was to cease to attach "if the trade or manfacture carried on be altered or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire," unless before the occurrence of loss or damage the insured obtained the written sanction of the company.

The nature of the occupation was changed as secondly stated, and the company's sanction was not obtained. The building was totally destroyed by fire.

There is no fact in dispute. Besides the facts already stated it was proved that the premiums charged by insurance companies for wool-scouring establishments are considerably larger than those asked for buildings used merely as stores.

If upon the undisputed facts a jury, properly understanding the case, cannot reasonably find a verdict for the plaintiff it is the duty of the Court under Order XXXVIII. r. 10 (corresponding to English Order XL. r. 10) to enter judgment for the defendant. In this case the learned Judges of the Full Court thought that on the undisputed facts a jury could not reasonably answer the question with which I began, otherwise than in the affirmative. I agree with them.

The appeal should, therefore, be dismissed.

BARTON J. The only questions are: (1) whether the finding of the jury, that the change in the occupancy did not increase the risk of loss or damage by fire, ought to have been set aside as a conclusion at which they could not reasonably arrive, and if so,

(2) whether judgment was rightly entered for the defendant company, or whether there should be a new trial.

The jury found that there had been a change in the occupancy, and though that finding is not impeached, the facts relating to the change must be considered in order to determine whether it increased the risk.

The policy described the building as "occupied by the assured as a bulk store." In the building as insured there were no fireplaces and no iron flues (see the proposal); it had been used, but had ceased to be used, for the manufacture of cement; and it was then occupied, not for any manufacturing process, but only as a place in which goods were deposited and kept until required. It was opened only when goods were stored or removed. At the same time, there does not appear to have been any restriction on the kind of goods which might be stored there, save that, of course, it was not contemplated that the plaintiffs would store any explosive, in breach of the Act of 1895. And there is no evidence that any explosive was ever stored there, or, indeed, anything but cement.

The place was occupied as a bulk store until June 1908. It was then occupied by a Mr. Stevens for wool-scouring until June 1909, when it was handed over to a Mr. Martin, to whom Mr. Stevens had sold his business. Mr. Martin continued to carry on the wool-scouring business in the building, and in December 1909 the place was destroyed by fire while occupied in that way.

The nature of the occupation for wool-scouring was as follows:—Brick fireplaces, four in number, were built in. Each had a brick chimney ascending from it for a certain height, then there was an iron flue which went through the wall or roof into the open air. These fireplaces were used to heat water for the process, and over each, supported by brickwork, was an iron tank holding four hundred gallons of water to be heated. Each fireplace measured about three feet six inches from front to back and eighteen inches across, and stood two feet away from the wall. Billets of wood three feet in length were burned in these fireplaces. Wool-scouring is thus described by a witness, Mr. Stevens: "In wool-scouring, process is to heat the water to certain temperature, add soft soap, and pick and put it" (*i.e.*, the wool)

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"into tank with fire burning, and then pot-stick the wool and pass it out, and so to rinsing water. Then throw from rinsing rack to another dry one, and then put out in sun to dry." According to Mr. Martin, the fires were lit about three times a week, and were kept burning through the night which followed the day on which they were lit. Thus, as the same witness puts it, a fire kindled say on Monday night, before leaving the premises, would burn all night "for Tuesday morning," which seems to mean that the water would then be heated ready for the next day's scouring.

Now, for this business of wool-scouring Mr. Martin had "three wool-presses made of wood and iron, two large wooden troughs, wool baskets made of cane, three wooden tables for holding wool, one dozen large sheeting for drying wool on." All this was inflammable material. But there was something worse, for there were the greasy wool for scouring (five bales at the time of the fire), the scoured wool ready for delivery (eleven bales at that time), and sheepskins with the wool still attached—of these there were three bales when the fire broke out. From these skins it was the practice to scrape off the wool, which was, of course, in the grease. They were put in a heap, and water was poured on them till they became rotten. Presumably this was to make it easier to scrape the wool off. "They get very hot at times," says Mr. Martin; "if you leave them they get very hot, almost to smoulder."

Two fire insurance experts were examined. One of them, the secretary of the Fire Underwriters' Association at Perth, said that fire risk was greater in wool-scouring than in a bulk store for storing cement. The comparison as measured in premiums was between 12s. 6d. per cent. and 20s. to 40s. per cent. (The comparison is hardly an exact one, as the store might have been used within the policy for the keeping of things easily ignited, such as furniture, or even wool; still, there would be the comparison in risk between merely storing inflammable material and carrying on an active process involving the continuous use of fire for considerable and frequent periods in connection with inflammable material). This witness had never seen a wool-scouring establishment.

The other expert was the defendant company's manager in Western Australia, who accepted the bulk store risk. He said that at the present time the rate of premium for a bulk store would be 12s. 6d. per cent., and for wool-scouring it might run to 40s. The wool-scouring establishment would involve the greater risk. This witness had seen wool-scouring businesses, and had himself worked one in the country. In answer to an interrogatory administered by the defendant company, the plaintiffs said that at the time of the proposal cement and machinery were stored in the building, and that there was no further, or other, or personal occupation.

Now, how did the plaintiffs seek to meet all this evidence? The policy having stated that the walls, partition and roof were of iron—it was corrugated iron—they elicited that the building was so constructed at the time of the fire, and that the supports were of jarrah wood, fifteen inches by fifteen. The floor was of cement a foot thick. The fire, which totally destroyed the building, did not take place in the part of it where the wool-scouring was carried on. It happened on a Monday, and no fires for the wool-scouring had been lit on either of the three days immediately preceding.

That the materials of its construction did not render the building fire-proof need not be pointed out. Assuming that it was not a building so constructed as to be very likely to take fire, that fact is not relevant to the question at issue. For that question is simply whether the nature of the occupation was changed in such a way as to increase the risk. If it was, the sanction of the company admittedly not having been obtained before the occurrence of the loss, then the condition of the policy was broken, and the risk ceased to attach, by the express agreement of the plaintiffs. It is immaterial also whether the fire occurred where the wool-scouring was carried on, or whether it happened while there was a fire in any of the brick fireplaces. Neither of these facts went to countervail an unsanctioned change in the nature of the occupation of the place, or an increase in the risk of fire. If the evidence for the defendant company discharged the onus of proof which lay upon it as to the change and the increase of risk, then the plaintiffs have made no answer.

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Putting the matter with fairness to the assured, it was open to them, in using the place as a bulk store, to keep in it any class of goods which were not explosives within the meaning of the Statute—even highly inflammable goods, such as drapery or spirits. But it is one thing to store goods in a place, which requires to be opened only for their deposit or removal, and, on the face of it, quite another thing, to carry on within it a process which necessitates the use of inflammable materials and appliances in proximity to fires—and fires which often have to be left burning by night as well as by day. Let us consider the difference which would arise in the case of some one class of inflammable goods. A place, not very liable to take fire if empty, is used for the mere storage of bales of wool, both greasy and scoured, and of sheepskins. Then a change is made, and the place is used, not for storage, but for the process of wool-scouring, and exactly the same kind of material is dealt with. The wool is taken out of the bales, and scraped from the skins. It is submitted to processes involving the use of wooden and cane appliances and sheeting. These processes are carried on in proximity to several fireplaces in which fuel is burned, and these fires are kept going by night as well as by day. Would any underwriter in his senses insure the place under the original and under the changed conditions at anything like the same premium? Is it possible for any reasonable man to deny that the risk of fire has been increased? It is difficult to reason about such a matter, because one can scarcely submit the self-evident to the ordinary processes of reasoning. The change in the nature of the occupation which the jury affirmed to have occurred, was a change from a mere housing of goods to an active process involving the use of fire near things that might easily be ignited. Even had the goods stored there previously in quiescence been more inflammable than those dealt with after the change, the risk of fire would have been obviously increased by the handling and placing of the latter near the fires in the fireplaces erected since that event. As a mere matter of fact, the converse was the case. It was the substances handled after the change that were the more inflammable, when the surroundings had become more dangerous. And after all, the comparison is not between the facts of the

wool-scouring and some possibility in previous storage, but between states of fact as they existed.

In my opinion, the breach was amply proved, and the evidence was all one way. But the position of the plaintiffs is no better, if the right view is that there is some slender evidence in answer. Clearly, at the most, there was not enough to entitle the jury to disregard the proof of breach with any show of reason. Even if they totally ignored the evidence of the two underwriters who compared the risks of fire in a bulk store and in a wool-scouring establishment respectively, there remained the evidence of the actual conditions. Upon the evidence as it stands, there is no pretence that the plaintiffs can better their case. If the same verdict were given on a second trial, it would be the duty of the Supreme Court again to set it aside, for the facts admit of only one conclusion. But the law does not necessitate such a tedious and extravagant course. The authorities cited by *McMillan* J. at the conclusion of his judgment are directly in point, and there are others to the same effect. It is manifestly the duty of the Court to interfere by directing the right judgment where, on the undisputed facts, only one conclusion is reasonably open, and the jury have adopted the opposite view. The learned Judges have rightly performed that duty in ordering judgment to be entered for the defendant company.

The appeal must therefore be dismissed.

HIGGINS J. Condition 9 of the policy has been already stated. At the time of insurance the property was "occupied as a bulk store." This fact appears on the face both of the proposal and of the policy. It happened that on the day of insurance the only things stored were cement and machinery; but there was nothing to prevent the keeper of the store from storing anything else there the next day without obtaining the sanction of the insurance company. There is an Act of Western Australia (the *Explosives Act* 1895) which forbids the storing of gunpowder and other such explosives except in specially licensed premises; but there was nothing to prevent the storing on these premises of furniture, or wool, or benzine, or kerosene. To store furniture, or wool, or benzine, or kerosene, instead of cement and machinery

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would not involve a change in the "*nature* of the occupation of the building." Mr. *Northmore*, for the company, admits this. A change in the things stored does not involve a change in the "nature of the occupation." The words refer to the character of the business, to the essence, not the accidents, of the occupation. They are to be read in the light of the preceding words—"If the trade or manufacture carried on be altered." They do not refer to negligence in the conduct of the business. But, in this case, the "nature of the occupation" was changed, as the plaintiff admitted, and as the jury found. For the property came to be occupied as a wool-scouring establishment—an occupation of a wholly different character. But the company remained liable for loss by fire unless the occupation was changed "in such a way as to increase the risk of loss or damage by fire." The jury has found that the change did not increase the risk of loss by fire; and the question is: Is the verdict so manifestly against evidence and the weight of evidence as to justify a Court of Appeal in setting aside the verdict and entering judgment for the company? The only clear evidence on the subject is that of the secretary of the Perth underwriters' association: "fire risk greater in wool-scouring than in bulk store *for storing cement*"; and he says in confirmation—and no objection was taken to the evidence—that the rates charged for insurance are much higher for wool-scouring establishments of similar construction. This evidence was not weakened by cross-examination, or contradicted. The true contrast to be made, however, in ascertaining whether there is an increase of the risk, is not between a "bulk store *for storing cement*" and a wool-scouring establishment, but between a bulk store for storing anything (including furniture, or wool, or benzine, or kerosene) and a wool-scouring establishment. This was the view taken by the learned Judge at the trial in his direction to the jury. He says:—"It is admitted that the nature of the occupation was changed—that from being used as a bulk store, *no matter for what purpose*, it became used as premises "for the scouring of wool." It must be assumed that the jury acted on this direction; and they found that the change of the nature of the occupation did not increase the risk. In setting aside the verdict, the learned Judge who pronounced the reasons for judg-

ment says:—"It would therefore, in my opinion, have been a breach of the condition for the plaintiffs to bring *any dangerous substances* into the building without the consent of the company. The real question was whether there was an increase of risk in carrying on the wool-scouring business *in the manner described instead of continuing the use of the premises for the storage of cement and machinery.*" I am unable to concur with such a construction of the policy.

The question then remains: Is the finding of the jury so obviously against evidence and the weight of evidence that no jury could properly find such a verdict? Is the evidence such that only one conclusion can properly be drawn? This is the test approved by the Lord Chancellor in *Paquin Ltd.* v. *Beauclerk* (1), and by this Court in the *National Mutual Life Association of Australasia Ltd.* v. *Kidman* (2). In other words, is it clear that the jury did not honestly and intelligently apply their minds to their function? Is the finding "directly contrary to the undisputed evidence"? Can we say, in the words of *Lindley* L.J. (*Allcock* v. *Hall* (3)), that the jury "if they had viewed the whole of the evidence reasonably, could not *possibly* have found such a verdict"? Personally, I may be inclined to the view that the introduction of fire as an active agent, for the necessary operations of wool-scouring, did increase the risk; but I have not, and we have not, the right to usurp the functions of the jury. As for evidence—apart from the nature of the case—there is, in truth, none, on the only true issue. I cannot bring myself to say that it would be impossible for any jury to reasonably find a verdict for the plaintiffs, to find that the change of the "*nature of the occupation* of the building" from storing goods of any kind, whether furniture, or benzine, to wool-scouring, does not involve an increase of risk of fire. If the question were merely as stated by the Chief Justice in his judgment, I should be found in agreement with my learned colleagues; but I cannot agree that the question is as stated. It is not enough, under condition 9, for the defendants to show that the introduction of fireplaces and fire increases the risk of fire; they must show that

(1) (1906) A.C., 148, at p. 160. (2) 3 C.L.R., 160.
(3) (1891) 1 Q.B., 444, at p. 446.

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the *change in the nature of the occupation*, from the one kind of business to the other, increases the risk of fire. The true question for the jury was: Does the change from the business of storage, no matter what is stored, to the business of wool-scouring, increase the risk of loss by fire? This is an issue for the common-sense of the jury, and not for the Court. We have no right to take into account the facts that the premises were left open at night for tramps, and that no one was left in charge while the fires burnt at night. These facts are not involved in the *nature* of the occupation of wool-scouring. We have no right to enter a verdict for the defendant company, if the occupants, by negligence, actually increased the risk of loss by fire. Such is not the contract. We have to assume, in applying the condition, that equal care is used when the premises are used for the storage of goods and when they are used for wool-scouring. The door may be open for tramps in the case of storage as well as in the case of wool-scouring; and who can say that the danger of loss by fire is not as great when tramps, with their pipes and matches and billies, lie about in a store containing wool and benzine? We have nothing to do with the facts that the fire took place on Monday morning, and that there was no fire on the premises on Friday, Saturday or Sunday; or with the fact that the fire took place in the other portion of the building. The only issue is as to the increase of risk involved in the changed *nature* of the occupation. Finally, these conditions printed on the policy should not be treated as exonerating the company one inch more than the words expressly declare or *necessarily* imply. For they are drawn up by skilled hands, after much experience and consideration, and with a keen eye on the conditions of other companies in competition; the insured persons have no choice as to the words used; and if the words used are in any way ambiguous, if they can be construed as leaving the insured persons free of care (as between themselves and the company) as to the management of the premises, so long as the risk be not increased by the very nature of the business, they should be so construed: *Verba cartarum fortius accipiuntur contra proferentem* (*Neill* v. *Duke of Devonshire* (1)).

(1) 8 App. Cas., 135, at p. 149, *per* Lord *Selborne*.