[HIGH COURT OF AUSTRALIA.]

BUGGE . . . . . APPELLANT;
PLAINTIFF,

AND

BROWN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 10, 11, 27.

Isaacs, Higgins and Gavan Duffy JJ.

Employer and Employee—Negligence of employee—Liability of employer—Scope of employment—Damage caused by fire—Disobedience of instructions as to place where fire to be lighted.

The defendant, who was the owner of certain grazing land, employed a servant to work on the land who was entitled, as part of his remuneration, to be supplied with cooked meat. On one occasion the servant was supplied with raw meat for his midday meal, and was instructed by the defendant to cook it at a certain house on the land. For the purpose of cooking the meat the servant, notwithstanding those instructions, lighted a fire at another place on the land nearer to where he was then working. By the negligence of the servant the fire escaped and spread to the land of the plaintiff and did damage there.

Held, by *Isaacs* and *Higgins* JJ. (*Gavan Duffy* J. dissenting), that in the circumstances the lighting of the fire was within the scope of the servant's employment, and therefore that, notwithstanding the servant had disobeyed the instructions of the defendant as to the place where the fire should be lighted, the defendant was responsible for the consequences of his servant's negligence.

Per Higgins J.:—(1) The precise terms of the authority are not the criterion of liability: the function, the operation, the class of act to be done by the employee, is the criterion. (2) The decisions under the *Workmen's Compensation Act* are not safely applicable to cases where third parties are injured who are in no privity with either the employer or the employee.

Decision of the Supreme Court of Victoria (*Irvine* C.J.): *Bugge* v. *Brown*, (1918) V.L.R., 413; 40 A.L.T., 24, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Albert Bugge against Oswald Richard John Brown in which, by his statement of claim, the plaintiff alleged that the defendant was a farmer at Cope Cope; that on or about 27th December 1917 at Cope Cope the defendant by his servant or agent lit a fire upon certain land, or alternatively was guilty of negligence in that he lit a fire in such a place and under such circumstances and conditions that the said fire was likely to escape or get out of control and spread, and/or in that he failed to take any proper or sufficient steps to prevent the said fire from escaping, getting out of control or spreading; and that the said fire escaped, got out of control, and spread to the plaintiff's farm and occasioned damage amounting to £1,300 16s. 3d. The material defence of the defendant was that, if his servant or agent did light a fire or did fail to take such steps as were alleged in the statement of claim, he was not acting within the scope of his authority.

The action was heard by *Irvine* C.J., who, after hearing the evidence, the nature of which is stated in the judgments hereunder, and having assessed the damage done at £1,022, found that the lighting of the fire by one Winter, who was a servant of the defendant, was, with regard to the place where and the circumstances under which it was lighted, an act of negligence on Winter's part, but that the lighting of the fire was not within the scope of Winter's employment. The learned Judge, therefore, gave judgment for the defendant: *Bugge* v. *Brown* (1).

From that decision the plaintiff now appealed to the High Court.

Starke and *Dethridge*, for the appellant. An owner of land who permits another person to light a fire on his land is liable for damage caused by the escape of the fire through the negligence of that other person, and he is not relieved from liability by the fact that that other person has disobeyed his instructions as to the particular place where the fire is to be lighted (*Salmond on Torts*, 4th ed., p. 250; *Black* v. *Christchurch Finance Co.* (2)). He is bound to take ample precautions against his instructions being disobeyed, and to prevent

(1) (1918) V.L.R., 413; 40 A.L.T., 24.

(2) (1894) A.C., 48.

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damage. The doctrine has been put to this extent: that the mere permission by an owner to go on his land is sufficient to impose upon him liability for damage caused by a fire negligently allowed to escape. It at any rate goes to this extent: that if the owner gives his servant authority to go on his land and light a fire in a certain place and the servant lights it in another place, the owner is liable if the fire escapes through the negligence of the servant. [Counsel referred to *Hardaker* v. *Idle District Council* (1); *Filliter* v. *Phippard* (2).]

[ISAACS J. referred to *Batchelor* v. *Smith* (3).]

The learned Chief Justice was wrong in saying that the act of Winter in lighting the fire was not within the scope of his authority. The lighting of a fire was a necessary act in the course of his employment to enable him to do his work, and was therefore for the benefit of the respondents, and so was within the scope of Winter's employment (*Limpus* v. *London General Omnibus Co.* (4)).

[ISAACS J. referred to *Lloyd* v. *Grace, Smith & Co.* (5).]

The service of Winter involved that he should cook the raw meat which was given to him for his midday meal, and for that purpose that he should light a fire. If the act which causes damage is incidental to the employment of the servant, that is sufficient to make the employer liable. (See *Halsbury's Laws of England*, vol. XX., p. 252; *Ruddiman & Co.* v. *Smith* (6); *Charles R. Davidson & Co.* v. *M'Robb* (7).) On the evidence the direction given to Winter as to lighting the fire at Old Kimbolton was given only for the purpose of convenience, and not for the purpose of preventing damage arising from the escape of fire, and cannot be construed as a limitation on the authority to light a fire.

Schutt and *J. R. Macfarlan*, for the respondent. The proper rule of law as to liability for damage arising from the escape of fire is that when a fire is lighted on land with the permission of the occupier, and is of such a nature that in the ordinary course of events it will spread over the land, and is therefore a perilous thing, the occupier will be liable if, through negligence, it escapes. That is shown by *Black* v. *Christchurch Finance Co.* (8).

(1) (1896) 1 Q.B., 335.
(2) 11 Q.B., 347.
(3) 5 V.L.R. (L.), 176; 1 A.L.T., 12.
(4) 1 H. & C., 526.
(5) (1912) A.C., 716.
(6) 60 L.T., 708.
(7) (1918) A.C., 304, at p. 321.
(8) (1894) A.C., 48.

[ISAACS J. referred to *Matthews* v. *Forgie* (1).]

But a distinction must be drawn between such a fire and a domestic fire, that is, a fire lighted for cooking purposes or for warmth. It is, in Australia, a natural use of fire to light it in the open for cooking purposes (*Whinfield* v. *Lands Purchase and Management Board of Victoria* (2)). Such a fire is not a dangerous thing, and is not within the principle of *Rylands* v. *Fletcher* (3). *Black* v. *Christchurch Finance Co.* (4) is distinguishable on the ground that in that case there was authority from the occupier to do a dangerous act. (See *Pollock on Torts*, 10th ed., pp. 522, 523.) The lighting of the fire in this case was not within the scope of Winter's employment. In order that the respondent may be held liable it is necessary to show that he authorized the act of Winter, either expressly or impliedly. An authority will not be implied merely from the fact that the act was done during the employment, but the act must have been involved in carrying out his employment (*Williams* v. *Jones* (5)). It must have been done as part of his duty; and that is what is meant by saying that it must have been done in the course of his employment. (See *Stevens* v. *Woodward* (6).) The terms "scope of employment" and "scope of authority" mean the same thing (*Lloyd* v. *Grace, Smith & Co.* (7)). The cooking of the meal was no more an act done in the course of his employment than was the act of eating the meal. The only authority in this case to light a fire is to be gathered from the conversation between the respondent and Winter, and it was a special and limited authority to light a fire at Old Kimbolton. The direction as to the place for lighting the fire is so wrapped up in the authority as to limit it. The evidence does not show any negligence on the part of Winter. The place where he lighted the fire was a place where a man might reasonably think it was safe to light it, and there is no evidence of any negligence in respect of the escape of the fire from that place. [Counsel also referred to *Joseph Rand Ltd.* v. *Craig* (8); *Plumb* v. *Cobden Flour Mills Co.* (9); *Baker* v. *Earl of Bradford* (10); *Weighill* v.

(1) (1917) N.Z.L.R., 921.
(2) 18 C.L.R., 606, at pp. 612, 619.
(3) L.R. 3 H.L., 330.
(4) (1894) A.C., 48.
(5) 3 H. & C., 256; 602.
(6) 6 Q.B.D., 318.
(7) (1912) A.C., at p. 736.
(8) (1918) W.N., 290; 312.
(9) (1914) A.C., 62.
(10) 114 L.T., 1144.

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South Hetton Coal Co. (1); *Harding* v. *Brynddu Colliery Co.* (2).]

Starke, in reply. The liability in respect of fire is no different in the case of domestic fires from that in the case of any other fire (*Black* v. *Christchurch Finance Co.* (3)). [Counsel also referred to *Jones* v. *Festiniog Railway Co.* (4); *Kelly* v. *Hayes* (5); *Elliott on Workmen's Compensation*, 7th ed., p. 55.]

Cur. adv. vult.

March 27.

The following judgments were read :—

ISAACS J. The parties to this appeal are neighbouring farmers in the north-west district of Victoria. On 27th December 1917 a labourer named Winter was employed by the respondent on his farm, and while there engaged lit a fire which spread to the appellant's farm and destroyed property to the value of £1,022. The question is whether the respondent, who controlled the servant, is responsible to make good the damage, or whether it must be borne by the appellant, who was helpless in the matter. The action was tried by the learned Chief Justice of Victoria, who decided it in favour of the respondent; and this is an appeal from that decision.

The facts leave no doubt in my mind that Winter was negligent in relation to the fire, in lighting it where he did, and also, as I think probable, in not guarding it carefully, for it seems to have served the purpose for which it was lit before the conflagration occurred. In either case there was negligence, and in the finding of negligence on the part of Winter I agree with the Chief Justice. His Honor, however, held that, notwithstanding Winter's negligence and the damage ensuing, Brown was not liable to make good the appellant's loss, and the question for our determination is whether that conclusion can be supported.

Learned counsel for the appellant ultimately put forward three propositions of law for holding Brown liable. First, he contended that the owner of land is liable for damage caused by any fire

(1) (1911) 2 K.B., 757.
(2) (1911) 2 K.B., 747.
(3) (1914) A.C., at p. 54.
(4) L.R. 3 Q.B., 733.
(5) 22 N.Z.L.R., 429.

there in fact kindled or kept by his servant whether negligently or not, and whether or not in the course of his employment. This contention was rested on a case decided in 1401—*Beaulieu* v. *Finglam* (1). Next, he contended that even if that ancient rule were now mitigated by reason of English Statutes, the liability still remains whenever a servant lights or keeps a fire negligently. For this he relied on *Filliter* v. *Phippard* (2). Lastly, he relied on the admitted doctrine that at all events an employer is liable where his servant lights or keeps a fire negligently but within the course of his employment.

The first proposition the Court ruled against during the argument. Whatever may have been anciently considered the true rule of the common law, the rigorous proposition so contended for cannot now be maintained.

It will be convenient to deal with the third proposition, which is a well traversed region, before considering the second.

The learned Chief Justice, who based his judgment upon this phase of the question, thought that the relevant principles of law are not very clearly settled. With great respect, I am of opinion that they are not really in doubt. The difficulty lies, not in the statement of the law but in ascertaining, in a given case, the scope or sphere of the servant's employment as a matter of fact. The learned Judge, having heard the witnesses and formed an opinion as to their credibility, accepted the evidence of the respondent as to what instructions he gave Winter, and there are no circumstances in the present case which permit a Court of appeal to depart from that conclusion. We must, therefore, begin by accepting the findings of fact as stated in the judgment under appeal. On the facts as he has stated them, and on those facts alone, the learned Chief Justice proceeded to consider whether the lighting of the fire on that occasion came within Winter's scope of employment. His Honor, after stating that he acted on the principles of *Harding* v. *Brynddu Colliery Co.* (3), *Weighill v. South Hetton Coal Co.* (4) and *Plumb v. Cobden Flour Mills Co.* (5), said that he was of opinion that Winter in lighting

(1) Y.B. 2 Hen. IV., 18, pl. 6.
(2) 11 Q.B., 347.
(3) (1911) 2 K.B., 747.
(4) (1911) 2 K.B., 757.
(5) (1914) A.C., 62.

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the fire where he did was not acting within the scope of his authority. He, however, stated how he arrived at that conclusion.

Reading the judgment as a whole, and having regard both to the facts set forth and the facts omitted, it appears to me that, though founding as intended upon the cases quoted, the learned Judge reached his conclusion as to the scope of Winter's employment upon the effect of Brown's instructions regarded as an "authority" in the strict sense of the term, and, having found the "authority" to be limited, he thought it necessarily followed that "the scope or sphere of the employment" was similarly limited. However that may be, and whether the judgment is open to this criticism or not, the facts are before us, just as they were before the learned trial Judge, except that we are bound in this case to accept his view of the defendant's credibility. All the rest is inference from proved facts, upon which it is our duty, as a Court of appeal on fact as well as law, to draw our own inferences and express our opinion as to the legal result. Needless to say, our conclusions of fact are limited in their importance to this particular case, and cannot control any other case. But the law is of general importance. And the materiality and effect of the circumstances in evidence will be better appreciated if some of the well established postulates applicable to a case like the present, upon the basis of the third proposition, be first stated.

1. *The Law.*—(1) The responsibility of a master for the wrongful act of his servant does not depend merely on the question of authority, express or implied. He may be liable though the act be beyond any authority actually given by him. The expression "scope of authority" in its relevant sense may be wider than the limits of the "authority" itself. This position is well explained in *Dyer v. Munday* (1), and is authoritatively settled in *Lloyd* v. *Grace, Smith & Co.* (2).

(2) Nor does his responsibility rest upon any notion of ostensible authority (*Hamlyn* v. *Houston & Co.* (3)).

(3) Nor does it rest, notwithstanding forms of pleading, upon the doctrine of imputing the negligence or other wrongfulness vicariously

(1) (1895) 1 Q.B., 742.
(2) (1912) A.C., at pp. 732, 737.
(3) (1903) 1 K.B., 81, at p. 85.

to the master (*Houldsworth* v. *City of Glasgow Bank* (1); *Lloyd* v. *Grace, Smith & Co.* (2)).

(4) The master's responsibility may exist, notwithstanding he proves he has actually forbidden the act (*Limpus* v. *London General Omnibus Co.* (3); *Plumb's Case* (4); *Lloyd's Case* (5)).

(5) The master's responsibility may even exist where the law itself forbids the act as criminal (*Hamlyn's Case* (6)).

(6) The principle on which the responsibility rests is that it is more just to make the person who has entrusted his servant with the power of acting in his business responsible for injury occasioned to another in the course of so acting, than that the other and entirely innocent party should be left to bear the loss. The principle was enunciated about 1700 by *Holt* C.J. in *Hern* v. *Nichols* (7), was strikingly enforced by *Willes* J. in *Limpus* v. *London General Omnibus Co.* in 1862 (3), was reaffirmed and acted on by the Court of Appeal in *Hamlyn's Case* (8), and has been definitely approved by the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (9). A passage in *Smith on Master and Servant*, 5th ed., at p. 284, states the reason of the matter very well.

(7) The rule of law founded on that principle is that the master is responsible, provided the servant is acting in "the course of his employment." That phrase and various corresponding phrases, such as "scope of employment" (*Citizens' Life Assurance Co.* v. *Brown* (10); *Lancashire and Yorkshire Railway Co.* v. *Highley* (11)) and "sphere of employment" (*Plumb's Case* (4)) and other similar phrases, are used to indicate the just limits of a master's responsibility for the wrongdoing of his servant. We have seen that the narrow view of "limits of authority" whether actual or implied, or even where a definite prohibition against doing the act complained of exists, or where even the law itself forbids the act, does not determine the question of liability to answer for the wrong; for the act complained of may nevertheless be within the course ot the employment. But the law recognizes that it is equally unjust to make the

(1) 5 App. Cas., 317, at pp. 326-328, 339.
(2) (1912) A.C., at p. 734.
(3) 1 H. & C., 526.
(4) (1914) A.C., 62.
(5) (1912) A.C., at p. 737.
(6) (1903) 1 K.B., at p. 85.
(7) 1 Salk., 289.
(8) (1903) 1 K.B., see p. 86.
(9) (1912) A.C., see particularly pp. 726-727, 732, 738.
(10) (1904) A.C., 423, at p. 427.
(11) (1917) A.C., 352.

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master responsible for every act which the servant chooses to do. The limit of the rule—expressed in the widest form by the phrase "the course of the employment" or "the sphere of the employment" —is when the servant so acts as to be in effect a stranger in relation to his employer with respect to the act he has committed, so that the act is in law the unauthorized act of a stranger (*Turberville* v. *Stampe* (1); *Cheshire* v. *Bailey* (2); *Black* v. *Christchurch Finance Co.* (3)). This is the root of the matter.

The cases to which I have just referred recognize and act on the principle stated, but the principle itself is laid down in very distinct language by *Parke* B., when delivering the judgment of the Court in *Quarman* v. *Burnett* (4). That learned Judge says:—"Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey. . . . But *the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist.*" I need scarcely add, *how* it ceases to exist is not material.

(8) The act of the servant complained of is regarded as outside the relation, and as that of a stranger: (*a*) if he did not assume to act within the scope of his employment (*Hutchins* v. *London County Council* (5); *Highley's Case* (6); *Limpus's Case* (7)); or (*b*) if what he did was a thing so remote from his duty as to be altogether outside of, and unconnected with, his employment (*Barnes* v. *Nunnery Colliery Co.* (8); *Black* v. *Christchurch Finance Co.* (3); *Harding's Case* (9); *Weighill's Case* (10)).

(9) A prohibition, either as to *manner* (*Black's Case* (11)), or as to *time* (*ibid.*), or *place* (*ibid.* and *Harding's Case* (12)), or even as to the very *act* itself (*Limpus's Case* (13) and *Lloyd's Case* (14)),

(1) 1 Ld. Raym., 264.
(2) (1905) 1 K.B., 237, at p. 241.
(3) (1894) A.C., at p. 55.
(4) 6 M. & W., 499, at p. 509.
(5) 85 L.J. Q.B., 1177.
(6) (1917) A.C., at p. 372.
(7) 1 H. & C., at pp. 540, 543.
(8) (1912) A.C., 44, at pp. 49-50.
(9) (1911) 2 K.B., at p. 752.
(10) (1911) 2 K.B., 757.
(11) (1894) A.C., at p. 57.
(12) (1911) 2 K.B., at p. 755.
(13) 1 H. & C., at p. 540.
(14) (1912) A.C., at p. 737.

will not necessarily limit the sphere of employment so as to exclude the act complained of, if the prohibition is violated.

(10) An instruction or a prohibition may, of course, limit the sphere of employment. But to have that effect it must be such that its violation makes the servant's conduct complained of so distinctly remote and disconnected from his employment as to put him *quâ* that conduct virtually in the position of a stranger (*Whitehead* v. *Reader* (1); *Plumb's Case* (2); *Barnes's Case* (3)). This is the ultimately decisive consideration in this case.

In *Plumb's Case* Lord *Dunedin* referred to his own decision in *Conway* v. *Pumpherston Oil Co.* (4), pointed out that the Court of Appeal had approved and followed it in *Harding's Case* (5), and from his place in the House of Lords gave it new authority. His Lordship said there were two ways of frequent occurrence in which a workman might go outside the sphere of his employment, (1) when he did work which he was not engaged to perform, and (2) when he went into a territory with which he had nothing to do. In other words, if the *act* done was utterly unconnected with anything he was employed to do anywhere, it was outside the sphere of his employment; or, if the *place* where it was done was a place he had no right to be in at all, the act there done was equally outside that sphere. In either of those cases he is virtually a stranger *quâ* the act done. An instance is given by Lord *Cozens-Hardy* M.R. in *Weighill's Case* (6), when he supposes the case of a man employed to plough a field, and instead he ploughs a kitchen garden. There the employment is to do an act that is inseparable from the field, and ploughing the garden is an entirely different act. So with the case of the quarryman in the illustration given by Lord *Wrenbury* (then *Buckley* L.J.) in *Harding's Case* (7). The learned Lord adds: "He had no business there." I would add that when the learned Judge says the man "had no right to be there at all," or "had no business there," it must be taken in the full sense that there was no connection direct or incidental between his authorized employment and his presence in the prohibited place. In the narrow sense,

(1) (1901) 2 K.B., 48, at pp. 51-53.
(2) (1914) A.C., at p. 67.
(3) (1912) A.C., at p. 49.
(4) (1911) S.C., 660.
(5) (1911) 2 K.B., 747.
(6) (1911) 2 K.B., 757.
(7) (1911) 2 K.B., at p. 751.

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whenever an instruction is given to do an act in a particular place and it is violated by doing the act in another place, it can be said of the latter place that the servant had "no right to be there." The true meaning of the phrase is shown by *Harding's Case* (1), where the employment was to drill a certain hole. The instruction was to drill it from above, and there was a prohibition against drilling it from below. A violation of that prohibition, though of a most serious nature, still, in the opinion of the majority of the Court, left the drilling of the hole within the sphere of employment.

It is also shown by *Conway's Case* (2), where a miner, for the purpose of getting a pick which he required for his work, and which was left in a dangerous place, where he was forbidden to go, nevertheless went there, and was killed by an explosion of gas, and yet his disobedience did not take his act out of the sphere of employment. In those two cases there was no clear disconnection. It could not be said the men were in effect strangers. In each case they were, to use the words of *Kennedy* L.J. in *Harding's Case* (3), "engaged in carrying out the purpose of" their "employment." And it may be added that, where two sets of duties are entrusted to a servant, the separation—if there be a separation intended—must be clear and distinct. The same principle of justice and policy which made, as *Willes* J. says in *Limpus's Case* (4), the rule of a master's responsibility necessary, even where the servant's conduct was not authorized directly or indirectly, requires the master, when entrusting two sets of duties at the same time in the same hands, to make the line of demarcation clear and distinct. He gets the benefit of the servant's acts, and he alone has the full power of expressing any limitations he desires. He ought, if he so wishes, to express himself so that no reasonable doubt can exist in the servant's mind as to the character he fills at any particular moment, and so that he will be clear, beyond doubt, that a given violation contemplated by him will place him in the position of a stranger. He must understand that such a violation will constitute an act not merely one which he is prohibited from doing in a particular place, but one which he is prohibited from doing at all (*Barnes's*

(1) (1911) 2 K.B., 747.
(2) (1911) S.C., 660.
(3) (1911) 2 K.B., at p. 755.
(4) 1 H. & C., 526.

Case (1)). This is specially so when the servant is entrusted with a dangerous instrument (see *Rayner* v. *Mitchell* (2)). The duty which the master owes to his neighbours, who cannot protect themselves from tortious acts, as a person can when contracting, is not satisfied unless he either protects them by expressing himself unequivocally so as to clearly delimit the sphere of his servant's employment, or else accepts the responsibility of his servant's conduct when really acting in furtherance of the business entrusted to him. In case of doubt the maxim *Verba fortius accipiuntur contra proferentem* can never be more justly applied than on such an occasion (see *Story on Agency*, secs. 74, 452).

(11) When proper regard is had to the legal considerations to which I have referred, the question of whether a given act of a servant is or is not within the course of his employment is a question of fact dependent entirely upon the circumstances of the particular case. This is repeatedly adverted to in the House of Lords cases on the *Workmen's Compensation Act*. For instance, see the very recent cases of *John Stewart & Son* (1912) *Ltd.* v. *Longhurst* (3); *Lancashire and Yorkshire Railway Co.* v. *Highley* (4), and *Charles R. Davidson & Co.* v. *M'Robb* (5). It is a matter upon which minds often may differ, though in this case, when the facts are approached with a due consideration of the ultimate question to be solved, and the assistance that well established legal principles afford us, the problem, I think, offers no serious difficulty.

The ultimate formal question is whether the act of Winter, in lighting the fire on 27th December 1917 in McDonald's paddock for the purpose of cooking his midday meal, was within "the course of his employment," or was an act entirely outside the relation of master and servant, and therefore to be regarded as the act of a stranger. It is necessary to bear in mind the observation of Lord *Macnaghten* in *Lloyd* v. *Grace, Smith & Co.* (6), concurred in by other learned Lords, that the expression "*must be construed liberally.*"

As I understand the cases on the English *Workmen's Compensation Act*, including *Davidson's Case* (7), an act of a servant in the

(1) (1912) A.C., at pp. 50-51.
(2) 2 C.P.D., 357, at pp. 358-359.
(3) (1917) A.C., 249, at pp. 256-259.
(4) (1917) A.C., at p. 372.
(5) (1918) A.C., at p. 316.
(6) (1912) A.C., at p. 736.
(7) (1918) A.C., 304.

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course of the employment means an act in the course of the service either to effect directly the main purpose of his employment or to effect some purpose incident to it, and that, whether the incidental connection arises expressly or by implication.

No doubt, the *Workmen's Compensation Act* does not extend to protect third persons who are incapable of protecting themselves, but it extends to workmen, and is for their protection, they being considered as to a great extent not in a proper position to freely protect themselves. That is probably the reason the master's liability to his servant is, by analogy to the case of third persons, extended with accompanying safeguards beyond the mere terms of his authority, and as far as "the course of the employment."

I am, of course, not finally expressing an opinion on the point whether the phrase "course of the employment" means in all respects the same in the *Workmen's Compensation Act* as it does at common law between the master and third parties, though at present I see no difference. So far as the decisions under that Act rest on the words "arising out of," quite a different question arises, and I assent to the proposition that we might easily be misled in a case like the present if we implicitly followed the rulings as to those words. For the purposes of this case, however, I apply to it the observations in the decisions as to "course of employment," but I want to make it clear that I am able to reach the same result by the aid of the common law cases, notably, *Quarman* v. *Burnett* (1), *Limpus* v. *London General Omnibus Co.* (2) and *Lloyd* v. *Grace, Smith & Co.* (3), dealing with the liability to third persons.

I proceed now to consider the facts in evidence.

2. *The Facts.*—In order to determine whether Winter, in lighting the fire where he did, must be regarded with respect to it as an entire stranger to the respondent, there are many important facts to be considered along with those summarized by the learned Chief Justice. Indeed, it is impossible to judge of the matter accurately without viewing the actual situation as a whole as it existed on the morning of 27th December. The defendant was a grazier, whose home was situated at Lake Cope Cope. About three miles

(1) 6 M. & W., 499. (2) 1 H. & C., 526.
(3) (1912) A.C., 716.

away he had a large quantity of farming and grazing land. That part of the country, as appears from the public plans in evidence, is divided up by the Government into allotments, generally speaking very large—sometimes half a square mile and sometimes even more. At intervals, sometimes of a mile, sometimes less and sometimes more, roads a chain wide were reserved, so that in some localities every two allotments constituted a block a mile square, or 640 acres, with chain-wide roads surrounding the blocks. If a man bought, for instance, four such allotments, so as to have two blocks of 640 acres each, to work in conjunction as a farm or grazing area, he would have to fence them off, so as to allow the intermediate chain road to be clear. Gates would, however, permit easy access from one block to the other, and to all intents and purposes they would be one farm. Brown, in addition to his homestead, was owner of 1,180 acres, that is, nearly two square miles, of this description. He had two allotments of 320 acres, numbered respectively 22 and 23, and forming what is called McDonald's paddock, McDonald having been the original grantee. Across a chain road to the west, Brown had one complete allotment of 320 acres and part of another allotment, 220 acres (the balance, 100 acres, having passed into other hands); these two allotments were numbered respectively 6 and 7, and together were called Old Kimbolton. Not only were the two blocks, Old Kimbolton and McDonald's paddock, capable of being worked in conjunction, but this appears to have been actually the case. Gates were provided through which vehicles could pass from one place to the other. A haystack was placed in McDonald's paddock, at its very western edge, and close to the gate whence the hay could be taken to Old Kimbolton; and the farm labourers in both paddocks, as a recognized practice—it is not said as a requirement of their service—used to go to Old Kimbolton, that is, to the house there, to luncheon. The two blocks, consequently, were not inherently separate and independent holdings, so far as the employees were concerned. A chain road in such a locality offers no practical separation for farming purposes. Learned counsel for the respondent, when asked, did not formally admit the practical working unity of the two blocks, but very properly abstained from contending the contrary.

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On Old Kimbolton there stood a substantial, but uninhabited, house—the old homestead—and a dam with some water, and some chaff. On McDonald's paddock there stood, until some months previously, a hut 12 feet by 12 feet built of a framework of wooden poles, to which was attached—as is not uncommon in such localities—corrugated galvanized iron. The hut had an earthen floor, and a mud brick fire-place. The fire-place was approximately 5 feet long and 4 feet wide outside and 4 feet by 2½ feet inside. It was nearly 5 feet high, and the chimney was about 8 feet high from the ground. The hut had been built by a man named Ferrier, who lived in it in the previous year while farming the paddock on half shares with the defendant. When Ferrier left, a few months before the fire, he took away the galvanized iron, leaving the wooden framework, the earthen floor and the chimney. Near the chimney there was a dam with water in it, and there was a stable in close proximity. There still remained, therefore, a substantial fire-place, and this with an earthen floor was a place where what is called a "domestic fire" for men working on the paddock could be built with much more convenience by men working out of doors at a distance from the homestead than is usually met with in similar circumstances. So much for the locality.

As to the personal relations of the defendant and Winter, it is established that Winter and Larsen, who accompanied him on this occasion, had been in defendant's employ a long time—Winter for eight years. Winter was a rouseabout, having general duties. As the learned Judge says: "He was employed in various kinds of work on the farm." His remuneration was 15s. a week and food. When at the homestead, his food was, of course, prepared by the station cook; and, when going any distance, he was usually provided with a midday meal, including cooked meat—in such case, however, he would probably follow the ordinary custom of boiling his own billy of tea. Meat is, as is well known, regarded in such cases as a necessity; and, it needs scarcely be added, cooking is equally a necessity. It was the master's place to see to the cooking of the meat. On 27th December, however, when Winter was ordered to cut thistles in McDonald's paddock, it appears the cook had gone. What was Brown to do in order to fulfil his duty of seeing that his employee

Winter had cooked meat for his day's work of cutting thistles on McDonald's paddock? He might have got someone—Winter or someone else—to cook the meat before leaving. That would have been a matter of a few minutes. To omit it altogether would have been unusual and harsh, and against the interests of both master and servant, having regard to the work to be done. It is beyond question that the cooking of the meat was intimately connected with the performance of the day's task of cutting the thistles. The course actually taken was this:—Mrs. Brown, the defendant's wife, packed a box with food. This was done with the knowledge of the defendant. Supplementing her statement with some statements by Winter, which have not been contradicted and are probably true, and which, therefore, I accept as true, the food consisted of raw chops, bread, sauce, raw potatoes and tea. He had a billy (as appeared from his written statement of 27th December, the day of the fire), evidently for the tea, and he had a saucepan (as appeared from his evidence) to boil the potatoes (referred to in his evidence and his written statement). But in the box there was also a frying-pan. Mrs. Brown had put that in, and, when Brown observed it, there occurred the conversation on which the learned Chief Justice of Victoria bases his conclusion. This is the respondent's account:—"In the box I noticed a large frying-pan generally used by the cook during shearing time." I stop there to observe that the disproportionate size for this occasion of the frying-pan, which was used by the cook when large numbers of men at shearing time were required to be fed, appears to have attracted Brown's attention. He continues:—"I: 'What are you going to do with the frying-pan?' He: 'I am going to put chops in it.' I: 'There is no need to take that frying-pan at all.' I took it out of the box and put it on a form. I: 'You go to Old Kimbolton and cook chops, there is a frying-pan there and also plenty of water.' He: 'I am going to the dam.'" Let us consider a moment what this answer meant to them both. It meant that Winter said in effect: "I know there is a frying-pan at Old Kimbolton, but the reason I wish to take this big frying-pan is that I intend to go from the thistle-covered part of the paddock to the part where the old dam is situate—otherwise I would have to go a mile to the other frying-pan."

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The respondent continued :—" I : ' Don't go to the dam at all, you go to Old Kimbolton and cook chops there.' He : ' All right, I'll go to the old place.' Old Kimbolton is usually known by that name or the old place. I : ' You can leave horse and buggy at stack and work at it east and west and make up to stack for dinner-time.' " It is to be observed that all he says in the last statement is : " You *can* leave horse and buggy at stack "—not " you *must.*" I do not suggest that this would have altered the position, but the milder form of words is adopted for a reason.

It is clear to my mind that after Winter's explanation why he wanted the big frying-pan, Brown, as between giving Winter the big frying-pan and letting him go the distance to the other, preferred the latter course, and so intimated. And Winter, not then seeing any middle course, said : " All right, I'll go to the old place." The final words of Brown are a mere suggestion of a ready means to lighten the labour of going to Old Kimbolton to get what was then thought by both parties to be indispensable to cooking the chops—a frying-pan. It is also to be observed that not a single word is said about danger of fire at the old chimney. No one appears to have considered the matter from the standpoint of danger. Mrs. Brown herself did not when she placed the frying-pan in the box. Winter did not when he announced his intention to go there. Brown did not, as appears for three reasons : first, because he did not refer to it ; next, because he swore twice (once at the McDonald Police Court, and again in the Supreme Court) that he considered the place quite safe ; and, lastly, because his expressed objection was connected directly with the frying-pan, the reason for his objection, judging by his evidence, being the inordinate size of that frying-pan, its weight and the trouble of taking it, and possibly also the inconvenience at shearing time if this special utensil were lost or spoilt, or the expense of replacing it. He knew that the tea had to be made, and that potatoes had to be cooked, but he makes no general reference to cooking, merely to the chops, and so really confined his observations to the frying-pan. It was not unnatural for Winter to believe, nor at all events so unreasonable as to be beyond the honest belief of Winter, from what Brown said and from what he left unsaid (and Winter's conduct in acting

as he did is strong evidence that it was his honest belief) that the real objection, and the only objection, that Brown had to cooking at the old chimney was the supposed necessity of taking the big special frying-pan; and that, provided that objection was obviated either by substituting a gridiron for the frying-pan or by doing without the meat and contenting himself with making tea and boiling the potatoes, he could cook his food at the old chimney without so far deviating from his instructions as to put himself entirely outside the service. If we eliminate the idea of danger and also the objection to the use of the frying-pan, what possible reason could be given for the prohibition, and, what is more important, what possible reason would Winter, as an old employee of eight years' standing, think Brown had for the prohibition?

It is also to be noted that, in suggesting to Winter to leave the horse and buggy at stack and work east and west, reaching the stack at dinner-time, Brown contemplated Winter in the first place taking the box of uncooked food to McDonald's paddock. The presence of Winter on McDonald's paddock with his food uncooked was therefore contemplated by Brown. After working that paddock east and west (it is a mile long) on what the Chief Justice calls "a warm summer's day," the men were probably fairly tired and hungry. Winter adopted the not uncommon expedient of constructing out of a piece of fencing wire a rough and ready gridiron, and with this substitute for a frying-pan, and with the billy for the tea and the saucepan for the potatoes, proceeded to cook the dinner for the two men. The act of cooking the meal was not the single purpose of the defendant's authority to cook, it was not even the main purpose, it was in itself a subsidiary or incidental purpose, the work in McDonald's paddock being the main purpose; and this main purpose was practically impossible without the subsidiary purpose.

Winter says—and there is neither contradiction nor any reason for disbelieving him—that he made a gridiron himself so as not to waste time. It is quite plain that it did save time: it saved Winter's time and Larsen's time. But their time was their employer's time too. Energy spent in harnessing up and driving over, and driving back and unharnessing, was profitably saved in the interests of

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master and man. (See the observations of *Collins* M.R. in *Blovelt* v. *Sawyer* (1).) Hungry and tired men are none the worse for an earlier meal and more rest in the interval between the morning and the afternoon hours of labour. And the employer gets the benefit of this also. The meal at the old chimney was no "*excursus*" of the *servant*; it was not "a frolic of his own." It was something purporting to be done in the line of the servant's employment. And it was not so remote from the employment as directed, that Winter can be regarded as a stranger or intruder on McDonald's paddock in lighting that fire, or as having no right to be there at all.

The most that can possibly be said against it, in my opinion, is that it was a disregard of an instruction to cook chops with a frying-pan at Old Kimbolton. There was no real difference between such an instruction and one to light the fire at any particular spot in McDonald's paddock; whether at Old Kimbolton house or in the old chimney of Ferrier's hut, it was a "domestic fire," an act of the same nature, but in the latter place under more risky circumstances. And the same thing could be said if made at any other spot in the two blocks.

The matter may be simplified in this way. If nothing had been said about the place where the chops were to be cooked, and Winter had simply been given the raw food and sent to McDonald's paddock to cut the thistles, no doubt can exist that cooking the meal at the old chimney would have been within the sphere of employment. To that, however, was added the "instruction" to perform the act of cooking the chops by means of the frying-pan at Old Kimbolton, and not at the old dam. That is no more than a specific direction as to the place where *the authorized act* is to be done, and the place where it is forbidden to be done. So far as relates to the sphere of employment, the act authorized (that is, "authorized" in the broad and liberal sense that it was authorized to be done somewhere on the respondent's farm, though not strictly authorized to be done in the place where it was done), having regard to the main immediate object, namely, the sustenance of the farm labourers for their day's work, was "the cooking of the chops" and also of the other food—in other words,

(1) (1904) 1 K.B., 271, at p. 274.

the making of a fire for cooking. The place where that act was directed to be done was Old Kimbolton, and not the old dam, but the act was not inseparable from Old Kimbolton. Indeed, the very prohibition to do the act of cooking at the old dam connotes that the act authorized is the simple act of cooking, and that the place is not an essential part of the act. It resembled the act authorized in *Harding's Case* (1) and *Black's Case* (2) and *Conway's Case* (3), rather than the act authorized in *Weighill's Case* (4) or *Barnes's Case* (5).

In my opinion the defendant is responsible on the basis of the third proposition advanced by learned counsel for the appellant. It is therefore unnecessary for me to consider his second proposition. But I would add reference to *Becquet* v. *MacCarthy* (6) and to *Musgrove* v. *Pandelis* (7).

The judgment appealed from should be reversed, and judgment entered for the plaintiff appellant for £1,022, with costs.

HIGGINS J. The standing wheat and other assets of farmer A have been burnt. The fire came from the land of farmer B, through the negligence of B's employee. Which is to bear the loss—A or B?

It has been found as a fact that the fire was lit by the employee Winter in order to cook some chops &c. given to him by B for the midday meal of Winter and another employee; both of whom were sent to a distant part of B's property to cut thistles. The men were entitled to "keep" as part of their remuneration, and it was, of course, the duty of B to cause any meat given to be cooked. Winter was instructed by B to cook, but to cook at Old Kimbolton, a deserted homestead about a mile or more away from the work; and instead of going to Old Kimbolton he began to cook at an old chimney close to the operations. As my brother *Isaacs* points out, it is by no means established that the object of the instructions to cook at Old Kimbolton was to prevent the danger of the fire spreading; they are, at the least, equally consistent with the theory that the

(1) (1911) 2 K.B., 747.
(2) (1894) A.C., 48.
(3) (1911) S.C., 660.
(4) (1911) 2 K.B., 757.
(5) (1912) A.C., 44.
(6) 2 B. & Ad., 951, at p. 958.
(7) 35 T.L.R., 202.

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object was to relieve the men of the big frying-pan commonly used for the shearers. But the object does not matter; the actual instructions I accept as found by the Court below. The finding of negligence—negligence in the lighting and care of the fire—on the part of Winter has not been seriously impugned; but it is said that, as between A and B, A must bear the loss because the cooking was not done at the authorized place.

After finding the facts, the learned Chief Justice of Victoria decided "on the principles adopted by the Court of Appeal" in England in certain cases under the *Workmen's Compensation Act*, that "Winter's act in lighting the fire where he did was not within the scope of his authority," and that therefore the defendant was not liable. If an employer is not to be liable for the negligence of his employee unless his instructions are strictly followed, as to time, place and method, then it will be easy for employers to frame forms of authority for their employees, and so absolve themselves from responsibility as to the consequences to their neighbours of the employees' negligence. I cannot think that we are forced to any such conclusion. It was B, not A, who chose Winter as an employee; it was B, not A, who could superintend and control him.

The principle on which the Judicial Committee of the Privy Council has based the liability for damage by fire as between adjoining owners is that expressed in the maxim *Sic utere tuo ut alienum non lædas* (see *Black* v. *Christchurch Finance Co.* (1)). But for an Act, 14 Geo. III. c. 78, sec. 86, it would seem that ordinarily the law as to fire is the same as with regard to other dangerous things introduced on land, and that the owner of the land on which the fire starts is liable to his neighbour for the consequences of its escape. That Act, however, according to the decisions (*Filliter* v. *Phippard* (2)) limits the liability to cases of negligence; and I assume (it is not controverted) that the Act is in force in Victoria. But the negligence may be on the part of employees, or even on the part of an independent contractor (*Black* v. *Christchurch Finance Co.* (3)). In that case, the contract was to fall and burn bush, the falling to be by a certain date, "and burn in a favourable

(1) (1894) A.C., at p. 54. (2) 11 Q.B., 347.
(3) (1894) A.C., 48.

time about February next." The contractor, in lighting the fire, did not take "reasonable precautions" against its spread, adopted no "preventive measures"—was, in short, guilty of negligence. The burning actually took place on 23rd December; but the Judicial Committee said that the landowners "having authorized and entrusted the operation . . . to another . . . must answer for his" (the contractor's) "proceedings, however much he may have violated their instructions or the detailed conditions of his contract with them. . . . Assuming that there was a violation of the terms of the contract on the contractor's part in burning so early as the end of December this cannot in their Lordships' opinion affect the defendants' liability to third persons injured by the act of their contractor. . . . It could not be said he" (the contractor) "was a trespasser when he lighted the fire, so that the defendants would not be liable for his act. So also if the contractor disregarded or violated stipulations as to the manner of lighting, or *the place at which the fire should be lit.*" The same doctrine as to liability is extended to the case of frauds committed by an employee although the principle of *Sic utere tuo ut alienum non lædas* is hardly applicable. A solicitor's clerk who did the conveyancing business induced a client by fraud to sign conveyances &c., and used the proceeds for his own purposes. There was no suggestion that the solicitor had authorized what was done by the clerk; but the solicitor was held liable to the client (*Lloyd* v. *Grace, Smith & Co.* (1)). The fraud was done "in the course of the master's business"—"in the course of" the clerk's "employment." The expressions of *Willes* J. in *Barwick* v. *English Joint Stock Bank* (2) were explained and adopted:—"The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service . . . though no express command or privity of the master be proved. . . . In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true that he has not authorized the particular act, but *he has put the agent in his place to do that class of acts*, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his

(1) (1912) A.C., 716. (2) L.R. 2 Ex., 259, at p. 265.

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master to place him in." The doctrine is stated in *Story on Agency*, sec. 452: "The principal . . . is held liable . . . for the frauds, . . . torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them." (See also *Limpus* v. *London General Omnibus Co.* (1).)

It seems clear from these and other cases that the phrases "in the course of the employment," "in the course of the service," "within the scope (or sphere) of his authority," &c., do not mean "in exercise of his authority" in the same sense as in the case of contracts made by agents. The precise terms of the authority are not the criterion of liability: the function, the operation, the class of act to be done by the employee, is the criterion—whatever be the instructions as to the time, the place, or the manner of doing the act. In other words, the employer is liable for damage resulting from the negligent use of a fire on his land if he has sanctioned the lighting of the fire anywhere on his property for the occasion. Applying the words of *Willes* J. in *Barwick's Case* (2), the question is: Did the employer put the employee "in his (the employer's) place to do that class of acts"? In this case Winter was put in the employer's place to light a fire and cook the meat, the employer's duty being to cook the meat or to get it cooked. Winter was entrusted by the employer with the function, was not acting of his own whim but for his employer's purposes.

As for the decisions under the *Workmen's Compensation Act*, I cannot think that they are safely applicable to cases where third parties are injured who are in no privity with either the employer or the employee. The employee is privy to the terms of the authority; the adjoining owner is not; and the Act (sec. 1) makes the employer liable to the employee for injury by accident "*arising out of and in the course of the employment.*" It has been laid down that the words "out of . . . the employment," indicate that there must be a causal relation between the accident and the employment itself—or an order, expressed or implied, given by the employer

(1) 1 H. & C., 526. (2) L.R. 2 Ex., at p. 266.

(*Chas. R. Davidson & Co.* v. *M'Robb* (1)). There is no such causal relation necessary in such a case as the present. Yet it is significant that even in these decisions under the *Workmen's Compensation Act* the Judges have rejected the narrow meaning for "the course of the employment." They ask themselves the question, did the order (disobeyed) limit the sphere of employment, or was it merely a direction to do things in a certain way within the sphere of employment. This distinction is found in the very cases to which the Chief Justice refers. In *Plumb* v. *Cobden Flour Mills Co.* (2) it is expressly stated that even a violation of the order is not conclusive as to excess of the scope of the employment. In *Weighill* v. *South Hetton Coal Co.* (3) the learned Judges distinguished between misconduct within the sphere or scope of employment and misconduct outside that sphere or scope. So, too, in *Harding* v. *Brynddu Colliery Co.* (4) ; and *Kennedy* L.J. said :—"Provided that he meets his death by accident in the performance of the particular piece of work which it is his duty to do, I do not think that the mere fact of non-compliance with a limitation as to area, any more than the mere fact of non-compliance with a limitation as to method, if the purpose of the non-compliance is the effective furtherance of the purpose of the workman's proper task, ought to be held necessarily, or indeed ordinarily, to put his death by the resulting accident outside the employment. . . . 'Sphere of employment' appears to me" (said the learned Judge) "to be rather a dangerous metaphorical expression, in so far as it tends to introduce a suggestion of special importance, in regard to sec. 1 of the Act, of the workman's obedience to an order as to the local area of working." In *Barnes* v. *Nunnery Colliery Co.* (5) Earl *Loreburn* says : "The thing he does imprudently . . . is different *in kind* from anything he was required or expected to do"; and then the act is treated as outside the "sphere" of employment. Such a principle, of course, leads to startling differences of opinion between the Judges—so great is the difficulty in determining what is a difference *in kind* and what is not a difference in kind. It is hard to divide one authority into two parts, one part

(1) (1918) A.C., at pp. 317, 327.
(2) (1914) A.C., at p. 66.
(3) (1911) 2 K.B., 757.
(4) (1911) 2 K.B., 747.
(5) (1912) A.C., 44.

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of the essence and the other part not, and this was the difficulty, as I think, of the Chief Justice. Nevertheless, even if this Court were bound by the decisions under the *Workmen's Compensation Act* as to the limits of the responsibility of adjoining owners for fire, I should feel justified, on the decisions, in finding against the defendant. But, according to my view, it is better to keep clear of these cases, decided under the words of a very exceptional Act.

In my opinion, the appeal should be allowed.

GAVAN DUFFY J. In his statement of claim the plaintiff alleges that on or about 27th December 1917, at Cope Cope, the defendant by his servant or agent was guilty of negligence in that he lit a fire in such a place and under such circumstances and conditions that the said fire was likely to escape or get out of control and spread; and/or in that he failed to take any proper or sufficient steps to prevent the said fire from escaping, getting out of control or spreading.

The evidence at the trial before *Irvine* C.J. showed that one Winter had lit the fire, and the questions in issue with respect to the defendant's liability were these: (1) Was the conduct of Winter negligent; and (2) if so, was the defendant responsible for Winter's negligence?

The Chief Justice found that the conduct was negligent, but that the defendant was not responsible for the negligence, and I agree with him for the reasons stated in his judgment.

In my opinion, the appeal should be dismissed.

Appeal allowed. Judgment appealed from set aside. Judgment entered for the plaintiff for £1,022 *with costs including costs of interrogatories. Respondent to pay costs of appeal.*

Solicitors for the appellant, *Mills & Oakley*, for *Oakley & Thompson*, Donald.

Solicitors for the respondent, *Blake & Riggall.*

B. L.