[HIGH COURT OF AUSTRALIA.]

WISE BROS. PTY. LIMITED . . . APPELLANT;
DEFENDANT,

AND

THE COMMISSIONER FOR RAILWAYS (NEW SOUTH WALES) . . . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 31; *Aug.* 1.

ADELAIDE, *Sept.* 17.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Negligence—Fire—Failure to extinguish—Spread to adjoining premises—Inflammable material in flour mill—Precautions for protection—Evidence—Expert—Admissibility—Natural user of land—Rule in Rylands v. *Fletcher.*

The Commissioner for Railways (N.S.W.) brought an action against a company, carrying on the business of, *inter alia*, a flour miller, alleging by three counts in his declaration: (1) negligence in the conduct of the defendant's business and in allowing inflammable matter to be on the land; (2) negligence in a non-natural user of the land involving accumulation of combustible matter without provision of proper fire-fighting equipment; (3) non-natural user of the land. There was no evidence as to how the fire originated, but there was evidence, *inter alia*, that at the time of the fire a very strong wind was blowing from the defendant's premises across the adjoining premises of the Commissioner, and that the defendant had combustible and explosive flour dust and fumes upon its premises where it was operating an electrically-driven flour mill and a factory plant which included a portable boiler, fire box and smoke-stack. There was also evidence from which it could be inferred that chemical fire-extinguishers ordinarily on the defendant's premises were not available. Evidence sought by the Commissioner from an expert witness as to necessary equipment in a flour mill for fire protection was rejected by the trial judge on the ground that the witness was not sufficiently qualified. The judge directed a verdict for the defendant. A new trial was granted by the Full Court of the Supreme Court. Upon appeal,

Held, that the user by the defendant of its land was not a non-natural user of that land and that the evidence by the expert witness as to what fire-fighting equipment should have been installed by, or available to, the defendant

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was wrongly rejected, therefore the new trial should be limited, by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. to the first and second counts, and by *McTiernan* J. to the second count.

Decision of the Supreme Court of New South Wales (Full Court): *Commissioner for Railways* v. *Wise Bros. Pty. Ltd.* (1946) 47 S.R. (N.S.W.) 233; 64 W.N. (N.S.W.) 34, affirmed subject to a variation.

APPEAL from the Supreme Court of New South Wales.

Wise Bros. Pty. Ltd. was the occupant of land situate at Narrandera on which it carried on the business of flour miller and manufacturer from flour offals and other substances of sheep fodder known as "sheep nuts." The premises on the land adjoined a railway siding belonging to the Commissioner for Railways (N.S.W.) and consisted of a store for flour, a flour mill, and, on the west of these buildings, a factory in which the sheep food, known as sheep nuts, was manufactured. The mill was operated by electric power. No power was used for the manufacture of sheep nuts, but they were cooked by means of steam. The steam was produced by a portable boiler and fire box standing outside the sheep-nut building about twenty feet from the south-west corner, the steam being led into the building by means of a pipe. The smoke-stack of the fire box had no spark arrester.

Prior to 13th October 1944, the weather at Narrandera had been dry for some time. On that day the weather was very hot and a strong westerly gale was blowing. Shortly before three o'clock in the afternoon, when both the flour mill and the sheep-nut plant were in operation, a fire broke out on the company's premises and, spreading rapidly, destroyed them. It also destroyed or damaged two brake vans and nine trucks which, at the time of the fire, were standing on the railway siding within the company's premises, and damaged the permanent way and certain electrical fittings, all of which were the property of the Commissioner for Railways.

In an action brought by the Commissioner in the Supreme Court of New South Wales against the company to recover damages in the sum of £2,169 2s., he alleged by three counts in his declaration: (1) that the company was negligent (*a*) in and about the conduct of its business, and (*b*) in allowing to accumulate large quantities of highly-inflammable rubbish and waste materials, and (*c*) in not providing adequate means of keeping the air in and around the land occupied by it free of inflammable fumes and dust, whereby a fire broke out on that land and spread to and damaged property of the Commissioner which was lawfully on that land; (2) that the company by a non-natural user of its said land accumulated and

allowed to be accumulated thereon large quantities of highly-combustible fumes, waste and other materials and neglected to provide proper fire-fighting equipment with the result that a fire which occurred on the said land spread to and damaged property of the Commissioner which was lawfully on that land and also spread to and damaged property of the Commissioner situated on land belonging to him and adjoining the company's land; and (3) that the company by a non-natural user of its land accumulated and allowed to be accumulated thereon large quantities of highly-combustible fumes, waste and other materials, and a fire having started on its said land, it extended and spread into the said accumulations and escaped therefrom and extended itself from and out of the said land and into and upon the land and property of the Commissioner, whereby certain carriages, trucks, electrical installations and equipment and other property of the Commissioner were damaged.

At the trial of the action two experts were called for the Commissioner. An analytical chemist gave evidence that flour dust in the air is highly inflammable, and a small source of flame would easily ignite it. It forms an explosive mixture in the air—one of the most easily exploded by a small source of heat. In a heap that was big enough and sufficiently high to generate heat it would be liable to slow spontaneous combustion, but not to inflammability or explosion. There was no evidence that there had been an explosion.

Mr. Milledge, a District Officer of the New South Wales Fire Brigades, in which he had had twenty-five years' experience, gave evidence that his present duties consisted in making building inspections. He had inspected many flour mills and not only had he had an extensive experience of many kinds of fires but he had had actual experience of two fires in flour mills. He had read standard literature, including a publication issued by the Commonwealth of Australia, relating to fire risks attached to flour mills and the precautions necessary with respect to the prevention of fires in such mills. Counsel for the Commissioner asked him the following questions, *inter alia*, "What is the effect of that dust (i.e. dust from flour) in the air?" "From your knowledge does that dust in the air add any danger?" "In your opinion, what would be necessary to put into flour mills for the purpose of fire protection?" Upon objections by counsel for the defendant the trial judge rejected these questions on the ground that the witness was not sufficiently qualified to express expert opinion thereon.

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Upon an application made on behalf of the defendant, *Maxwell* J. directed the jury to return a verdict in favour of the defendant. The trial judge ruled that the evidence did not establish a non-natural user of its land on the part of the defendant. His Honour expressed the opinion that the evidence fell far short of establishing even a prima-facie case that any fire brought on to the land, or any fire so brought coupled with the production of inflammable material in the nature of flour dust and/or debris capable of being easily ignited, escaped from the control of the defendant, nor was there any evidence from which it could be inferred that the conflagration which destroyed the mill and destroyed or damaged the Commissioner's property was caused by the defendant's use of its land. The origin of the conflagration was entirely unexplained. So far as the Commissioner's claim was based on negligence, as contrasted with absolute liability, his Honour held that there was no evidence from which it could be said that the fire which developed and ultimately spread to the Commissioner's property originated through any negligence on the part of the defendant. As regards the alleged failure to supply fire-fighting equipment and material for the extinction of the fire, his Honour held that, if there was such a failure, there was no evidence from which it could be inferred that it was causally connected with the spread of the fire to the Commissioner's property.

That verdict was set aside and a new trial ordered by the Full Court of the Supreme Court (*Jordan* C.J., *Davidson* and *Street* JJ.) on the ground that although the use to which the evidence showed the defendant to have put its premises did not constitute a non-natural user of land, there was some evidence of negligence on the part of the defendant in not taking immediate steps to extinguish the fire, and the rejected evidence of Mr. Milledge was admissible as tending to prove such negligence: *Commissioner for Railways* v. *Wise Bros. Pty. Ltd.* (1).

From that decision the defendant, by leave, appealed to the High Court.

Taylor K.C. (with him *Jenkyn*), for the appellant. The order appealed from should be wholly set aside because there was no evidence on the second count. Alternatively, a new trial should be limited. Three particulars of negligence are given in the first count, namely: (i) negligence in the conduct of the business; (ii) allowing inflammable rubbish and waste materials to accumulate; and (iii) not providing adequate means of dealing with inflammable fumes and dust. There was no evidence in respect of (i) and (ii).

(1) (1946) 47 S.R. (N.S.W.) 233; 64 W.N. 34.

As to (iii) there was no evidence that usual precautions taken in flour mills were not taken. It was established by the evidence that the fire started at the north-western corner of the mill store outside the range of the wind then blowing from the north-west, and also that the very strong head-wind then blowing was favourable to the rapid spread of the fire in a country town where the building was more or less composed of wood and there were few fire-extinguishers. It was not for an expert witness to say what in his opinion would be necessary to put into flour mills for purposes of fire protection. Had the witness tendered as an expert been sufficiently qualified it might have been proper for him to have given evidence as to what was usually put into flour mills for the said purposes, but not as to what was necessary. The appellant was only bound by what was usual or reasonable, that is to say, it was only bound to take the usual or reasonable precautions. The said witness was not familiar with the factory, therefore he was not qualified to give evidence as to what was desirable in that factory. In any event there must have been a verdict for the appellant because in the circumstances then prevailing no reasonable precautions could have been taken against the fire starting as it did and spreading with such rapidity. If the conditions were such that ordinary reasonable precautions would not have sufficed to put out the fire, then liability would not attach to the appellant for not attempting to do something which in the circumstances would have been ineffective. Alternatively, a new trial, if granted, should be limited and not general (*Rowe* v. *Edwards* (1); *Commissioner for Railways* v. *Small* (2)).

Fuller K.C. (with him *Stephen*), for the respondent. By virtue of the rejection of the expert witness' evidence the respondent was prevented from tendering any evidence of negligence under the first and second counts. That evidence was the foundation of the respondent's action. It was designed to establish that certain precautions were reasonable and necessary and were in fact installed in practically all the flour mills in the State, and also that the appellant was grossly negligent by permitting open fires in the flour mill and by not providing spark arresters. The appellant's liability, subject to certain exceptions, was absolute. The fire must be presumed to have originated through the negligence of the appellant and the onus is upon the appellant to disprove negligence. Prior to the passing of the Statute 6 Anne, c. 31 and the *Fires Prevention*

(1) (1934) 51 C.L.R. 351.

(2) (1938) 38 S.R. (N.S.W.) 564, at pp. 580-582; 55 W.N. 215, at pp. 220-221.

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(*Metropolis*) *Act* 1774, considered by this Court in *Hazelwood* v. *Webber* (1) the absolute liability for fire was part of the common law of England, but by the passing of that statute the strict liability for fire was modified: See *Holdsworth's History of English Law*, vol. 2, pp. 606, 607; *Viscount Canterbury* v. *Attorney-General* (2); *Havelberg* v. *Brown* (3); *Young* v. *Tilley* (4); *Filliter* v. *Phippard* (5); *Collingwood* v. *Home & Colonial Stores Ltd.* (6); *Mulholland & Tedd Ltd.* v. *Baker* (7); *Beven* on *Negligence*, 4th ed. (1928), vol. 1, p. 618; *Pollock & Maitland's History of the English Law*, 2nd ed. (1923), vol. 2, p. 527, and *Charlesworth* on *Negligence* (1938), p. 255. It was held in *Hazelwood* v. *Webber* (1) that the Statute 6 Anne, c. 31, did not apply to New South Wales. Therefore the old common law liability for fire must be the law applicable in New South Wales. It follows that the old common law of absolute liability for fire is still the law of New South Wales, subject only to three exceptions, each of which is a matter which the defendant must prove, namely, that the fire was (i) the act of the plaintiff himself, (ii) an act of God, and (iii) an act of a stranger. If a domestic fire escapes the owner of the property is liable.

[STARKE J. referred to *Bugge* v. *Brown* (8).]

An occupier is liable for the consequences of a fire negligently caused (*Boulcott Golf Club Inc.* v. *Engelbrecht* (9)). The fire is to be presumed to have originated through the negligence of the appellant and the onus is upon the appellant to disprove negligence (*Becquet* v. *MacCarthy* (10); *Clerk & Lindsell* on *Torts*, 8th ed. (1929), p. 396). The facts in *Hazelwood* v. *Webber* (1) were never in dispute, the only thing considered by the Court being whether burning off stubble was a natural or non-natural user of the land. The Court in that case did not consider the propositions now before this Court. The most that *Hazelwood* v. *Webber* (1) has done is to afford to a defendant another means of defence, but the proof of that defence always lies on the defendant and it does not affect the plaintiff's right to have his case determined on the basis of absolute liability. Once there is any dispute as to the particular facts of a case, as to whether it was a natural or non-natural user, the matter must be left for determination by the jury.

[LATHAM C.J. referred to *Read* v. *J. Lyons & Co. Ltd.* (11).

STARKE J. referred to *Rickards* v. *Lothian* (12).]

(1) (1934) 52 C.L.R. 268.
(2) (1843) 1 Ph. 306 [41 E.R. 648].
(3) (1905) S.A.L.R. 1.
(4) (1913) S.A.L.R. 87.
(5) (1847) 11 Q.B. 347 [116 E.R. 506].
(6) (1936) 3 All E.R. 200.
(7) (1939) 3 All E.R. 253, at p. 255.
(8) (1919) 26 C.L.R. 110.
(9) (1945) N.Z.L.R. 556.
(10) (1831) 2 B. & Ad. 951 [109 E.R. 1396.]
(11) (1947) A.C. 156.
(12) (1913) A.C. 263.

Taylor K.C., in reply referred to *Rylands* v. *Fletcher* (1); *Hazelwood* v. *Webber* (2); *Te Kloot* v. *Te Kloot* (3); *Aarons* v. *Rees* (4); *Salmond* on *Torts*, 10th ed. (1945), p. 537; *Law Quarterly Review*, vol. 42, pp. 37, 50.

[RICH J. referred to *Law Quarterly Review*, vol. 60, p. 207].

Counsel then referred to *Turberville* v. *Stamp* (5); *Whinfield* v. *Lands Purchase and Management Board of Victoria* (6); *Beaulieu* v. *Finglam* (7); *Boulcott Golf Club Inc.* v. *Engelbrecht* (8); *Bugge* v. *Brown* (9); *Read* v. *J. Lyons & Co. Ltd.* (10).

Cur. adv. vult.

Sept. 17.

The following written judgments were delivered:—

LATHAM C.J. The appellant company owned and operated a flour mill at Narrandera. The premises consisted of a store for flour, a flour mill, and on the west of these buildings a factory in which sheep food, known as sheep nuts, was manufactured. The buildings adjoined a railway siding belonging to the respondent, the Commissioner for Railways. On 13th October 1944 a fire broke out which destroyed the nut factory, the store and the mill and spread to the property of the Commissioner and there destroyed a number of railway carriages and trucks and damaged other property belonging to the Commissioner. The Commissioner sued the appellant company for damages. The declaration contained three counts. The first count alleged negligence in the conduct of the business of the company upon its land adjoining the lands of the plaintiff and in allowing inflammable matter to be on the land. The second count alleged negligence in a non-natural user of its land involving accumulation of combustible matter without the provision of proper fire-fighting equipment and materials. The third count alleged a non-natural user of the company's land involving an accumulation of quantities of combustible matter, and the starting of a fire on the land which extended and spread to the said accumulations and escaped therefrom to the Commissioner's land and property. Thus the first and second counts alleged negligence, and the third count relied upon absolute liability in respect of damage caused by the escape of fire from the company's land, irrespective of negligence.

(1) (1868) L.R. 3 H.L. 330.
(2) (1934) 52 C.L.R. 268.
(3) (1894) 10 W.N. (N.S.W.) 213.
(4) (1898) 15 W.N. (N.S.W.) 88.
(5) (1697) 1 Ld. Raym. 264 [91 E.R. 1072].
(6) (1914) 18 C.L.R. 606.
(7) (1401) Y.B. 2 Hen. IV., fo. 18, pl. 6.
(8) (1945) N.Z.L.R. 556.
(9) (1919) 26 C.L.R. 110.
(10) (1947) A.C. at pp. 169, 170, 174, 175.

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The origin of the fire was unexplained. A number of witnesses gave evidence as to the place where the fire started. The witnesses observed the fire at different stages and from different places. The fire spread very rapidly and with great violence. Some witnesses saw it first in a pile or piles supporting the floor of the flour mill. Others first observed the fire when it was burning in the nut factory which was at the west of the flour mill. The source of power for the operation of the flour mill was electricity. There was also a boiler and a stationary engine in a shed variously described as twenty to forty-five feet away from the southern boundary of the main building. The boiler was heated by a fire and was used for cooking the sheep nuts. According to the evidence, the fire started on the northern side of the flour mill, or on the western end of the nut store. There was a very strong wind, and if any spark had escaped from the fire in the engine it would have been blown away from the buildings which were destroyed by the fire. There was no spark arrester on the engine, but there was no evidence which could justify a conclusion that the fire was caused by a spark from the engine.

There was some evidence that fire-extinguishers were, or had been, somewhere on the premises, but that they could not be found on the occasion of the fire. There was evidence that there was no fire hydrant, available hose, or sprinkler system in the buildings.

The plaintiff called Mr. C. A. Milledge as an expert witness for the purpose of showing what precautions should have been taken against fire in a flour mill. The learned trial judge rejected his evidence on the ground that he was not qualified as an expert. Mr. Milledge was a District Officer in the New South Wales Fire Brigade organization. He had twenty-five years' experience in fire brigades. His duties consisted in making building inspections. He had inspected many flour mills and had acquainted himself with literature relating to fire risks attached to flour mills. He had had an extensive experience of many kinds of fires. The learned judge held that the witness was not qualified to give expert evidence and rejected his evidence.

Evidence was called for both plaintiff and defendant. The defendant applied for a direction to the jury to enter a verdict in its favour, and this application succeeded. The learned trial judge was of opinion that, as far as the claim based on strict liability was concerned, there was no evidence of non-natural use of the premises and that there was no evidence that any fire brought on to the land by the defendant had caused the conflagration which destroyed

the plaintiff's property. The origin of the fire was entirely unexplained. With respect to the claims based on negligence, the learned judge rejected the argument that the mere occurrence of a fire on the defendant's premises placed the onus of establishing absence of negligence on the defendant. With respect to fire-fighting equipment and materials, his Honour was of opinion that there was no evidence of negligence in failure to provide such equipment and materials, but that, even if there were such evidence, it could not be said that the fire spread and developed by reason of any negligence of the defendant in failing to make such provision.

Upon appeal, the Full Court held that there was no evidence of non-natural user of the land, and that the claim based on strict liability failed. As to the claims based on negligence, it was held that the evidence of Mr. Milledge was wrongly rejected and that there was some evidence of negligence. An order was made for a new trial.

In my opinion the case of the plaintiff, in so far as it depends upon the contention that the defendant is subject to an absolute liability independent of negligence for the damage done by a fire originating upon its premises and spreading to the plaintiff's property, is answered by the decision of this Court in *Hazelwood* v. *Webber* (1). In that case it was held that the law of New South Wales did not include the *Fires Prevention (Metropolis) Act* 1774, which re-enacted with some modifications 6 Anne, c. 58, and 12 Geo. III., c. 73. These statutes provided that the occupier of premises was not liable for the results of a fire which was kindled by accident, although he would be liable even in the case of an accidental fire if it were due to negligence (*Filliter* v. *Phippard* (2)). The Act of 1774 became part of the law of New South Wales by virtue of 9 Geo. IV., c. 83. The provisions of this Act were adopted by a New South Wales statute which therefore impliedly repealed the Act. The local statute was subsequently repealed. In *Hazelwood* v. *Webber* (1) the question arose whether the effect of the repeal was to restore the English statute or to leave the position as it was at common law. It was necessary for the Court to determine whether " the common law has been superseded by statute "(3). The Court held that the 1774 Act was not in force in New South Wales, and that the common law had been restored.

The Court authoritatively stated the rule of the common law on the subject in the following terms : " The common law imposed

(1) (1934) 52 C.L.R. 268.
(2) (1847) 11 Q.B. 347 [116 E.R. 506].
(3) (1934) 52 C.L.R., at p. 275.

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upon the occupier of land, who used fire upon it, a prima-facie liability which was independent of negligence for the harm suffered by his neighbour as a natural consequence of the escape of the fire " : See *Hazelwood* v. *Webber* (1). To this prima-facie liability, however, there were certain exceptions, including cases " when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier " (2).

The evidence in the present case showed that the operation of a flour mill brings about accumulations of inflammable dust, but it would, in my opinion, be impossible to support a finding by a jury or a decision by a judge that the use of land for the purpose of manufacturing flour is a non-natural user of land : See *Rickards* v. *Lothian* (3) ; *Read* v. *J. Lyons & Co. Ltd.* (4). Upon this ground the case falls outside the principle of strict liability which is established by *Hazelwood* v. *Webber* (5). But, further, the principle of strict liability as stated in that case is limited to the escape of fire " used " upon the premises by the defendant. There is, as already stated, no evidence that the fire which spread to the plaintiff's rolling stock originated from any fire brought upon the premises by the defendant or used on the premises by the defendant. Therefore, upon this ground also, the case does not fall within the category of strict liability.

The plaintiff's case must therefore depend upon negligence. The plaintiff was prevented from giving evidence as to the precautions which were reasonable for the prevention of the outbreak or spread of fire in a flour mill : See *Beven* on *Negligence*, 4th ed. (1928), vol. 1, p. 626, as to negligence in failing to provide appliances for extinguishing fire in premises used for manufacturing purposes. There was some evidence that the fire-fighting equipment was meagre and poor, but the plaintiff was not allowed to give evidence as to what the fire-fighting equipment should have been, because the witness called as an expert was held to be unqualified. In my opinion it was rightly held in the Full Court that the evidence of this witness was wrongly rejected. If a senior Fire Brigades officer of twenty-five years' standing, with long experience of fires, including fires in flour mills, specifically engaged in the inspection of buildings from the point of view of fire prevention and control, and equipped with a knowledge of the literature on the subject, is not qualified to give expert evidence upon the subject of what is

(1) (1934) 52 C.L.R., at pp. 274, 275, 280.
(2) (1934) 52 C.L.R., at p. 277.
(3) (1913) A.C. 263, at p. 280.
(4) (1947) A.C. 156.
(5) (1934) 52 C.L.R. 268.

proper equipment for fire prevention and control in flour mills, it is difficult to suggest that any witness at all could be qualified to give such evidence. I agree, therefore, with the Full Court that there should be a new trial, but only upon the counts with respect to negligence. The reasons for judgment of the Full Court show that there is no ground for a new trial in respect of the third count alleging strict liability.

I am therefore of opinion that the appeal should be dismissed, but that the order of the Full Court should be varied by directing that the new trial be limited to the first and second counts.

Rich J. I agree that there should be a new trial on the first and second counts. It is clear that the evidence of Mr. Milledge was wrongly rejected. The evidence as to his qualifications shows that he was *peritus* in every relevant sense.

Starke J. Appeal by leave of this Court from a judgment of the Supreme Court of New South Wales in Full Court allowing an appeal to it on the part of the Commissioner for Railways—the respondent here—and setting aside a verdict and judgment in favour of a company called Wise Bros. Pty. Ltd.—the appellant here—and directing a new trial of an action brought by the Commissioner for Railways against the company.

It appeared that the company was possessed of premises at Narrandera in New South Wales and there carried on the business of a flour miller and also made sheep fodder. The dust produced and accumulated in the process of flour milling has "a high degree of inflammability." "In the air with a small source of flame it is easily inflammable." On a very hot day in 1944, with an exceptionally strong wind blowing, a fire broke out on the premises whereon the flour mill was erected. It spread with great rapidity within the mill and on to the railways and premises of the Commissioner. The mill was destroyed and rolling stock and other property of the Commissioner was also destroyed or damaged. The Commissioner's claim was in respect of the damage sustained by him by reason of the destruction or damage to his property. The trial judge directed a verdict for the company and entered judgment accordingly but, as already appears, the Supreme Court directed a new trial.

This appeal from the judgment of the Supreme Court is more conveniently dealt with by consideration of the reasons advanced by the Commissioner in support of the judgment than those advanced by the company in opposition to it.

The Commissioner contended :

1. That the liability of the company for damage done by the

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spread of the fire from its premises was absolute and independent of negligence.

Count 3 of the declaration is relied upon as stating a cause of action founded upon this contention. It alleges that a fire, having started on the land of the company, escaped therefrom on to the property of the Commissioner, whereby his property was damaged. But this contention has always been open to doubt in English law and has been rejected by this Court in *Bugge* v. *Brown* (1) : and see *Hazelwood* v. *Webber* (2).

2. That " the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril ; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This is the doctrine of *Rylands* v. *Fletcher* (3). But " prerequisites of the doctrine are that there must be the escape of something from one man's close to another man's close and that that which escapes must have been brought upon the land from which it escapes in consequence of some non-natural use of that land " (*Read* v. *J. Lyons & Co. Ltd.* (4)).

Count 3 of the declaration is also relied upon as stating a cause of action founded upon this doctrine. On the evidence adduced, the cause of the fire is uncertain and conjectural. But it is clear that the use of the company's land for the purpose of a flour mill cannot, in modern times, be described as a non-natural use of the land (*Rickards* v. *Lothian* (5) ; *Hazelwood* v. *Webber* (6) ; *Read* v. *J. Lyons & Co. Ltd.* (7)). Such a use of the land was a reasonable enjoyment of the company's rights.

The third count cannot, therefore, find support in the doctrine of *Rylands* v. *Fletcher* (8).

3. Negligence.

The negligence, on the part of the company, relied upon is :—

(*a*) the careless use of fire on its premises ;

(*b*) the accumulation of inflammable material on its premises and omitting to provide adequate means for preventing its ignition and the outbreak of fire ;

(*c*) the accumulation of inflammable material on its premises and omitting to provide proper fire-fighting equipment for the suppression and extinction of any fire that broke out upon the land.

This seems to be the substance of counts 1 and 2.

(1) (1919) 26 C.L.R. 110, at p. 115.
(2) (1934) 52 C.L.R. 268.
(3) (1866) L.R. 1 Ex. 265 ; (1868) L.R. 3 H.L. 330, at pp. 340, 341.
(4) (1947) A.C. 156, at pp. 173-174.
(5) (1913) A.C. 263.
(6) (1934) 52 C.L.R., at p. 281.
(7) (1947) A.C. 156.
(8) (1866) L.R. 1 Ex. 265 ; (1868) L.R. 3 H.L. 330

The company maintained a boiler on its premises and used a fire for raising steam for mill purposes. The smoke-stack had no spark arrester. But the boiler-house was some twenty feet from the nearest wall of the company's premises and the strong wind was against sparks blowing from the smoke-stack into the mill. It is mere conjecture on this evidence how the fire originated and there was no other evidence of the use of fire on the company's premises. Standing alone, these facts do not support the allegation of the careless use of fire by the company resulting in damage to the Commissioner. The proof of careless use of fire was upon the Commissioner.

But when the company collected or allowed highly-inflammable dust to collect on its premises, then it was under a duty towards its neighbours, of whom the Commissioner was one, to take such reasonable precautions as a prudent man would have exercised under such circumstances to prevent its ignition and the escape of fire from its premises and also to suppress and extinguish any fire that there occurred (*Vaughan* v. *Menlove* (1); *Job Edwards Ltd.* v. *Birmingham Navigations* (2) the dissenting opinion of *Scrutton* L.J.; *Sedleigh-Denfield* v. *O'Callaghan* (3); *Donoghue* v. *Stevenson* (4) per Lord *Atkin*).

There was evidence to go to the jury of a breach of this duty on the part of the company and material and admissible evidence in support of the breach appears to have been rejected.

Consequently the judgment of the Supreme Court directing a new trial is right so far as counts 1 and 2 are concerned but cannot be supported as to count 3.

The judgment directing a new trial should be varied accordingly.

McTiernan J. The first and second counts of the declaration in this action allege that the fire which destroyed the plaintiff's property was caused by the defendant's negligence. The second count also contains an allegation of non-natural user of land. But in that count the defendant is not sued upon any cause of action other than negligence. The first count alleges negligence causing the fire to break out on the defendant's land and to spread to the plaintiff's property. The second count alleges negligence in not having proper equipment to extinguish the fire and in not extinguishing it. The basis of these counts seems to be that by using the land in the way alleged, the defendant created a grave risk of fire and that in the circumstances he had a duty proportioned to the risk to take care to prevent a fire breaking out and, if it did so, to

(1) (1837) 3 Bing. (N.C.) 468 [132 E.R. 490.]
(2) (1924) 1 K.B. 341, at p. 361.
(3) (1940) A.C. 880.
(4) (1932) A.C. 562, at pp. 580-581.

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put it out before it ignited the combustible waste lying about the premises.

There was ample evidence from which the jury could find that a fire broke out on the defendant's premises and, after burning for a while, extended into the mass of combustible dust and fumes about the premises and caused the conflagration which extended to the plaintiff's property. But there was no evidence from which the jury could find how the fire originated. The factory chimney had no spark arrester, but it would be mere conjecture, having regard to the established facts governing the probabilities, to attribute the origin of the fire to a spark which flew out of the chimney and lodged at a spot where fire was first seen on the defendant's premises. It was not suggested that the origin of the conflagration was a fire kindled by any person for whose act the defendant is responsible. The allegation in the first count is that the fire broke out in consequence of the negligent conduct by the defendant of its business and the accumulation of combustible dust and fumes. The evidence in my opinion fails to establish a causal connection between the fire and the defendant's operations on the land.

The issue which is raised by the second count is whether the defendant was negligent in and about providing fire-fighting equipment to deal with an outbreak of fire and in not taking proper action to extinguish the fire at its initial stage. The trial of this issue of negligence was unsatisfactory because of the rejection of Mr. Milledge as an expert witness. I agree that his evidence of his qualifications conclusively proved that he had sufficient skill and experience to enable him to express an opinion which would assist the jury to form a correct judgment on this issue. As to the principle by which the jury should be guided, it is useful to refer to the direction of *Cockburn* C.J. to the jury in *Blenkiron* v. *Great Central Gas Consumers Co.* (1): "And those who carry on operations dangerous to the public are bound to use all reasonable precautions—all the precautions which ordinary reason and experience might suggest to prevent the danger. It is not enough that they do what is *usual* if the course ordinarily pursued is imprudent and careless; for no one can claim to be excused for want of care because others are as careless as himself; on the other hand, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business." (See *Cox Bros. (Australia) Ltd.* v. *Commissioner of Waterworks* (2)).

(1) (1860) 2 F. & F. 437, at p. 440 [175 E.R. 1131, at pp. 1132, 1133].

(2) (1933) 50 C.L.R. 108.

The third count of the declaration alleges a non-natural user by the defendant of his land as a ground of a liability which is independent of negligence. It is necessary to sustain that allegation in order to make the defendant absolutely liable for the damage caused by the fire, as this count seeks to do (*Hazelwood* v. *Webber* (1)). The use by the defendant of this land for these industrial operations, which have been described, could not reasonably be held to be a non-natural user of the land: *Read* v. *J. Lyons & Co. Ltd.* (2).

For these reasons I think that there should be an order for a new trial limited to the second count, and that the order of the Full Court should be varied accordingly. Subject to this variation, I should dismiss the appeal.

WILLIAMS J. The nature of the pleadings has already been explained, and the evidence given on the first trial analysed and discussed in the judgment of the learned Chief Justice of the Supreme Court of New South Wales, and I shall not attempt to cover the same ground. The appellant, the defendant in the action, is the owner of certain land at Narrandera adjoining a railway siding owned by the plaintiff on which the defendant carries on in one building the business of a flour miller, and in an adjoining building the business of a manufacturer of sheep nuts.

On 13th October 1944, a fire originated on the defendant's premises and spread to the railway siding where it destroyed some of the plaintiff's rolling stock. The only fire which the defendant had lit on its premises on that day was the usual fire in the fire box of a portable boiler used to generate steam to cook the sheep nuts. The defendant was using electric power in its flour mill, and there is evidence that a highly combustible dust is produced in the manufacture of flour which is easily ignited by static electricity. This dust is the material referred to in the declaration as an accumulation of large quantities of highly combustible fumes, waste and other material. The declaration contains three counts, of which the first two claim that the damage to the plaintiff's property is due to the negligence of the defendant, and the third that the defendant is liable for such damage without negligence.

Whatever room there may previously have been for differences of opinion, I think that it is now clear from the speeches of the House of Lords in the recent case of *Read* v. *J. Lyons & Co. Ltd.* (2) that under the modern law of tort an occupier of land is not liable for damage caused by the escape of fire used on his land on to that of his neighbour, unless it was not a natural use of the land. This was the view of the law expressed by this Court in *Hazelwood* v.

(1) (1934) 52 C.L.R. 268, at pp. 277-279. (2) (1947) A.C. 156.

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Webber (1). It is stated in the joint judgment of *Gavan Duffy* C.J., *Rich* J., *Dixon* J., and *McTiernan* J. that—" When the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the prima facie rule of absolute responsibility for the consequences of its escape must give way " (2). This statement is entirely consistent with that of Lord *Macmillan* in *Read's Case* (3) where his Lordship said in reference to the doctrine in *Rylands* v. *Fletcher* (4) that : " The two prerequisities of the doctrine are that there must be the escape of something from one man's close to another man's close and that that which escapes must have been brought upon the land from which it escapes in consequence of some non-natural use of that land, whatever precisely that may mean " (5). It could not be said that the use by the defendant of its land at Narrandera as a factory and, as incidental thereto, the use of a boiler heated by fire to generate steam required for one of its manufacturing processes, was an unnatural use of the land under modern conditions. As Lord *Uthwatt* said in *Read's Case* (6), " ' natural ' does not mean ' primitive '." I agree therefore with the learned judges of the Supreme Court that the action is one in which the plaintiff can only succeed if he can prove that the damage to his rolling stock was caused by the negligence of the defendant.

There is evidence which, read most favourably to the defendant, shows that the only precaution taken by the defendant to combat an outbreak of fire on its premises consisted of about a dozen chemical fire-extinguishers of the bottle type. There was no sprinkler system and no fire hydrant. The plaintiff sought to call a district officer of the New South Wales Fire Brigade with twenty-five years' experience, who had inspected many flour mills, had been present at fires in flour mills, and had read standard publications on the subject, to give expert evidence of what precautions are necessary for the prevention of fires in such mills. He was asked his opinion as to what should be done in regard to fire appliances in flour mills. But his evidence was rejected by the learned trial judge on the ground that he was not qualified to express an expert opinion on this subject. I agree with the opinion of the learned judges of the Supreme Court that this evidence should have been admitted. The witness was at least qualified to give evidence of the appliances to fight fires which it was usual to install in flour mills, and this would be evidence of the precautions which it would

(1) (1934) 52 C.L.R. 268.
(2) (1934) 52 C.L.R., at p. 277.
(3) (1947) A.C. 156.
(4) (1868) L.R. 3 H.L. 330.
(5) (1947) A.C., at pp. 173, 174.
(6) (1947) A.C., at p. 187.

be reasonable for a flour miller to take to prevent damage by fire to his neighbours. Mr. *Taylor*, as I understood his argument, did not seriously contend that this evidence was not admissible. His real contention was that there was no causal connection between the absence of such appliances and the spread of the fire because the day was so hot and the wind so strong that no appliances could have saved the situation. Possibly this is right, but it is not a contention which can be fully examined in the absence of all the material evidence.

There is evidence that the smoke-stack of the boiler did not have a spark arrester, but there is no evidence that I can discover from which a jury could reasonably infer that a spark from the boiler originated the fire. But there is some evidence from which a jury could reasonably infer that the fire was started by the flour dust becoming accidentally ignited, and the real case against the defendant is that there was such a risk of this happening in the ordinary course of flour-milling operations, that the defendant was under a duty to take proper precautions to prevent a fire which originated on its premises in this manner escaping and doing damage to the property of its neighbours. It is on this issue that the evidence that was rejected would be material, and in its absence I do not think that it would be right to refuse a new trial on the ground that the weather conditions were such that no jury could reasonably be satisfied that the damage to the plaintiff's rolling stock was caused by the failure of the defendant to take proper precautions to guard against the risk of fire.

I am therefore of opinion that there should be a new trial limited to the question whether the damage done to the plaintiff's property was caused by the negligence of the defendant.

For these reasons I would dismiss the appeal, but vary the order appealed from by directing that the new trial should be limited to the first and second counts.

Rule of Supreme Court varied by directing that the new trial be limited to the first and second counts in the declaration. Otherwise rule affirmed and appeal dismissed with costs.

Solicitors for the appellant, *Dibbs, Crowther & Osborne.*

Solicitor for the respondent, *Fred. W. Bretnall*, Solicitor for Railways.

J. B.