App. 78 W.N. 238 : 61 S.R. 401
" 19 S.A.S.R. 195.
" V.P. 313 – 55 A.L.J.R. 378

[HIGH COURT OF AUSTRALIA.]

SCOTT . . . . . APPELLANT;
PLAINTIFF,

AND

THE PRESIDENT, COUNCILLORS AND RATEPAYERS OF THE SHIRE OF NUMURKAH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 23, 25, 26;

SYDNEY, *April* 14.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Evidence—Nuisance—Conflict of evidence—View by judge—What constitutes—Limits on use of—Experiment or demonstration—Supreme Court Rules 1939 (*Vict.*) O. 50, r. 3.

A motion picture exhibitor, who had, by deed, the right of exclusive use and occupation of portion of a municipal town hall at certain times, for the purpose of exhibiting therein motion pictures, brought an action against the municipality for nuisance and breach of a covenant to be implied in the deed. He alleged that noise created by bands &c. playing at dances and other functions conducted in a portion of the hall which had not been demised to him, namely, the supper room, gave rise to substantial interference with the use of his premises. At the completion of the evidence at the hearing, counsel for the defendant suggested to the trial judge that he should visit the hall and witness " a practical demonstration ". The trial judge agreed with this suggestion, and visited the hall, by arrangement and accompanied by counsel for both parties, on an occasion when motion pictures were being exhibited and a dance was in progress in the supper room. Counsel for the plaintiff did not acquiesce in the demonstration being regarded as part of the material before the court, nor did any consultation take place between counsel for the parties before the demonstration with a view to arranging that the noise produced at the demonstration would be similar to that complained of. No evidence was given after the demonstration that the noise heard by the trial judge was similar to that complained of. In his judgment the trial judge said that, if he had been at liberty to treat the demonstration as evidence, he would not have believed that the band had been the nuisance it had been represented to be, and he would have had no confidence in the plaintiff's evidence, but, as he was not so at liberty, he accepted the plaintiff's evidence

and found accordingly that the noise complained of did amount to a nuisance. The Full Court of the Supreme Court of Victoria allowed an appeal from this judgment on the basis that the trial judge was at liberty to use the results of his " view " for the purpose of determining the credibility of the conflicting bodies of evidence.

Held, that whilst the trial judge was entitled to have a view of the locus, he had in fact gone further and witnessed an experiment or demonstration, a course which should not have been followed except with the concurrence of both parties, or pursuant to a direction under O. 50, r. 3 of the *Rules of the Supreme Court* 1939. The trial judge was at liberty to use the results of his view for the purpose of understanding the questions raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence, and he was not at liberty to use conclusions formed or impressions gained as a result of the joint view and demonstration. Accordingly the order of the Full Court should be set aside, but, it being doubtful as to how far the findings which the trial judge was prepared to make might have been affected by a legitimate use of a view, there should be a new trial.

Unsted v. *Unsted* (1947) 47 S.R. (N.S.W.) 495, at p. 498; 64 W.N. 183, approved.

Decision of the Supreme Court of Victoria (Full Court), reversing the decision of *Gavan Duffy* J., reversed.

APPEAL from the Supreme Court of Victoria.

John Graham Scott (hereinafter called the plaintiff) commenced an action in the Supreme Court of Victoria, on 1st August 1952, against the President, Councillors and Ratepayers of the Shire of Numurkah (hereinafter called the defendant), a body corporate under the provisions of the *Local Government Act* 1946 (Vict.). The statement of claim, so far as relevant, was as follows :—

3. By a deed, dated 28th February 1950, the defendant demised to the plaintiff, for a term of three years from 1st January 1950, the amusement portion, including the auditorium, of Numurkah Town Hall (save and except the supper room, sweets stall and kitchen) (hereinafter called " the demised premises ") for the purpose of exhibiting therein motion pictures, on each and every Wednesday and Saturday night in each week during the term thereby created, with the right on the said nights between the hours of 6 o'clock p.m. and 12 o'clock midnight to the exclusive use and occupation of the demised premises, but subject to certain rights for the general public to use the cloakroom and lavatories. 4. Pursuant to the said deed the plaintiff went into and has remained in possession of the demised premises, paying the rent reserved by the said deed. 5. By the said deed the defendant covenanted with the plaintiff that he, paying the rent thereby reserved and observing

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and performing the covenants and stipulations on his part to be observed and performed, should peaceably hold the demised premises during the said term without any interruption by the defendant or any person lawfully claiming by, through, or under it. 5. (a) In the alternative, it was an implied term of the said deed that the defendant should not cause, or permit to be caused, in, or about, the said premises any act, matter or thing, which would disturb or interfere with the proper exhibition of motion pictures with sound tracks by the plaintiff upon the said premises, and that it should not permit any such disturbance or interference to be caused by persons using rooms in the town hall in the vicinity of the said premises. 6. In breach of the said covenant set out in par. 3 hereof, or alternatively in breach of the said implied term, the defendant has granted a lease or licence or has given permission to various persons for the purpose of holding dances on Saturday nights and on other nights in the supper room adjoining the demised premises. The said dances are conducted to the music of bands, which create a great deal of noise which materially interferes with the proper exhibition of motion pictures, together with the playing of the accompanying sound track, by the plaintiff, and are attended by large numbers of persons who cause noise during the exhibition of the said motion pictures in passing to and from the said supper room. 6. (a) Further, or in the alternative, the defendant, by so licensing the said supper room and permitting wrongfully the holding of such dances to the accompaniment of the said music, has created a nuisance in relation to the said premises, and by permitting, or allowing various persons to permit, large numbers of persons to hold and attend such dances, and to cause noise by passing to and from the said supper room on the occasions of such dances, has materially interfered with and disturbed the use of the auditorium by the plaintiff for the aforesaid purposes, and has interfered with and disturbed the proper enjoyment and user of the said premises by the plaintiff, and has caused loss and detriment to the plaintiff. And the plaintiff claims :

(1) An injunction restraining the defendant for the period of the term created by the said deed or any renewal thereof from—

(a) granting a lease or licence or other permission for the use of the supper room for the purpose of holding dances therein, or permitting dances to be held therein ;

(b) continuing the said disturbance and interference.

(2) Such further and other relief in the premises as may seem proper.

By summons dated 1st August 1952 the plaintiff applied for an interlocutory injunction in terms of the injunction sought by the

statement of claim. By consent, it was ordered that the hearing of this summons be treated as the trial of the action.

The application was heard before *Gavan Duffy* J., who, in a written judgment delivered 16th December 1952, ordered that the defendant, its servants &c., be restrained for the period of the lease or any extension thereof from permitting or allowing dances to be held in the supper room of the Numurkah Town Hall on nights on which the plaintiff was entitled to and was showing pictures in the portion of town hall demised to him. The relevant portion of the judgment is set out in the judgment hereunder.

The defendant appealed to the Full Court of the Supreme Court of Victoria. On 11th August 1953, that court, constituted by *Lowe* A.C.J., *Barry* and *Dean* JJ., allowed the appeal and ordered that judgment be given for the defendant. The relevant portion of the judgment is set out in the judgment of *Dixon* C.J., *Webb*, *Kitto* and *Taylor* JJ. hereunder.

From this decision, pursuant to special leave granted by the High Court on 17th September 1953, the plaintiff brought the present appeal.

E. R. Reynolds Q.C. (with him *S. H. Collie*), for the appellant. It is submitted that the trial judge was right in refusing to take into account what he saw and heard on his visit to the town hall. There was no evidence that the noise created on that occasion was similar to the noise complained of, nor was there any agreement between the parties to treat what was heard as being similar. The trial judge could, under O. 50, r. 3, of the Rules of the Supreme Court 1939, have given an appropriate direction for the making of an experiment, but no application was made for such an order. [He referred to *Canadian Bar Review* (1953), vol. 31, pp. 305 et seq.; *Chambers* v. *Murphy* (1).] The Full Court of the Supreme Court erred in holding that a view can be used to determine the credibility of two conflicting bodies of evidence. It is submitted that no use can be made of a view unless complete identity is established, or agreed to, as between the noise heard on the view and the noise complained of. [He referred to *Kessowji Issar* v. *Great Indian Peninsular Railway Co.* (2); *Goold* v. *Evans & Co.*, per *Somervell* L.J. (3); *Yendall* v. *Smith Mitchell & Co. Ltd.* (4); *MacDonald* v. *Goderich*, per *Roach* J.A. (5); *Chambers* v. *Murphy* (1).] The plaintiff was a lessee and not a mere licensee of the premises in question. [He referred to *Radio Theatres Pty. Ltd.* v. *Coburg* (6).]

(1) (1953) 2 D.L.R. 705.
(2) (1907) 23 T.L.R. 530.
(3) (1951) 2 T.L.R. 1189, at p. 1190.
(4) (1953) V.L.R. 369, at pp. 375-377.
(5) (1948) 1 D.L.R. 11, at pp. 19-20.
(6) (1948) V.L.R. 84.

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J. X. O'Driscoll Q.C. (with him *B. J. Dunn*), for the respondent. The trial judge's statement of the use to which a view may be put is taken from *Phipson* on *Evidence*, 9th ed. (1952), p. 5. The rule, as stated in *Wigmore* on *Evidence*, 3rd ed. (1940), vol. 4, p. 289, is much wider. A view may be used to decide the credibility of witnesses. [He referred to *Goold* v. *Evans* (1).] What took place on the occasion of the trial judge's visit to the town hall was a view. [He referred to *Manser* v. *Bowers* (2); *Lyons* v. *Winter*, per *Hood* J. (3); per *Williams*, *Holroyd* and *Hodges* JJ. (4); *Dunstan* v. *King* (5); *R.* v. *Rickard* (6); *Reg.* v. *Harvey* (7); *Humphrey* v. *Collier*, per *Macfarlan* J. (8).] The cases relied on by the trial judge were not directed to whether the results of a view might be used to decide questions of credibility as between conflicting bodies of evidence. [He referred to *Kessowji Issar* v. *Great Indian Peninsular Railway Co.* (9); *Smith* v. *Douglas* (10); *London General Omnibus Co. Ltd.* v. *Lavell* (11); *Bourne* v. *Swan & Edgar Ltd.* (12); *Cole* v. *United Dairies (London) Ltd.* (13); *Hodge* v. *Williams* (14); *Unsted* v. *Unsted*, per *Davidson* J. (15); *Way* v. *Way* (16); *Turner* v. *Commissioner for Road Transport & Tramways*, per *Maxwell* J. (17); *R.* v. *O'Meally* [*No.* 2] (18); *Yendall* v. *Smith Mitchell* (19); *MacDonald* v. *Goderich*, per *Roach* J.A. (20), per *Aylesworth* J.A. (21).] It is clear that the trial judge took the narrow view that a view may be used only for the purpose of understanding evidence and not for the purpose of weighing it. Under the deed it was intended that the defendant should continue to use the portion of the hall retained by it. In these circumstances an injunction should not have been granted. [He referred to *Lyttleton Times Co. Ltd.* v. *Warners Ltd.* (22); *Jones* v. *Pritchard* (23); *Pwllbach Colliery Co. Ltd.* v. *Woodman*, per Earl *Loreburn* (24); *Thomas* v. *Lewis* (25).]

[KITTO J. referred to *Clarey* v. *The Principal & Council of the Women's College* (26).]

(1) (1951) 2 T.L.R. 1189.
(2) (1872) W.N. (E) 163.
(3) (1899) 25 V.L.R. 464, at p. 465.
(4) (1899) 25 V.L.R., at p. 471.
(5) (1948) V.L.R. 269, at p. 272.
(6) (1918) 13 Cr. App. R. 140, at p. 143.
(7) (1869) 11 Cox. C.C. 546.
(8) (1946) V.L.R. 391, at p. 397.
(9) (1907) 23 T.L.R. 530.
(10) (1855) 16 C.B. 31 [139 E.R. 665].
(11) (1901) 1 Ch. 135, at p. 139.
(12) (1903) 1 Ch. 211.
(13) (1941) 1 K.B. 100, at p. 102.
(14) (1947) 47 S.R. (N.S.W.) 489, at p. 492; 64 W.N. 201.
(15) (1947) 47 S.R. (N.S.W.) 495, at p. 498; 64 W.N. 183.
(16) (1928) 28 S.R. (N.S.W.) 345, at p. 348; 45 W.N. 101, at p. 102.
(17) (1951) 51 S.R. (N.S.W.) 145, at pp. 150-151; 68 W.N. 155, at pp. 159, 160.
(18) (1953) V.L.R. 30, at p. 32.
(19) (1953) V.L.R. 369, at p. 377.
(20) (1948) 1 D.L.R. 11, at pp. 19-20.
(21) (1948) 1 D.L.R., at pp. 21-22.
(22) (1907) A.C. 476, at pp. 480-481.
(23) (1908) 1 Ch. 630, at pp. 635-636.
(24) (1915) A.C. 634, at p. 638.
(25) (1937) 1 All E.R. 137.
(26) (1953) 90 C.L.R. 170, at pp. 175, 176.

In the circumstances the injunction, in the form in which it was granted, was not an appropriate remedy. [He referred to *Jenkins* v. *Jackson* (1).]

E. R. Reynolds Q.C., in reply.

Cur. adv. vult.

April 14.

The following written judgments were delivered :—

DIXON C.J., WEBB, KITTO and TAYLOR JJ. This is an appeal by leave from an order of the Full Court of the Supreme Court of Victoria setting aside an order made in proceedings for an injunction and entering judgment for the defendant, the present respondent.

Before referring to the nature of the order made in the first instance or to the questions which arise on this appeal it is convenient, first of all, to make some mention of the circumstances in which the conflict between the parties arose. The respondent is a body corporate created by the provisions of the *Local Government Act* 1946 (Vict.) and is the owner of a building at Numurkah known as the town hall. The appellant is a motion picture exhibitor and on 28th February 1950, the respondent, by deed, purported to demise to him " the amusement part or portion of the building (save and except the supper room the kitchen and the sweets stall included therein and preserving the sole right to the licensee or proprietor for the time being of the sweets stall to vend refreshments and sweets before the commencement and during the interval of any motion picture performance) . . . for the purpose of exhibiting therein motion pictures but for no other purpose on each and every Wednesday and Saturday night in each week during the said term with the right on the said nights . . . between the hours of 6 o'clock p.m. and 12 o'clock midnight to the exclusive use and occupation of the demised premises subject to the right of free access of the general public to the ladies' and men's cloakrooms and conveniences therein ". The term of the " demise " was a period of three years from 1st January 1950.

The appellant had been the holder of a similar interest in these premises for at least three years previously to January 1950 and during the period or term commencing in that month he continued to use and occupy the " demised premises " for the purpose of exhibiting motion pictures. But as is apparent from the terms of the demise the town hall provided facilities for functions other than motion picture exhibitions. In particular the supper room was available for public and private dances and for wedding

(1) (1888) 40 Ch. D. 71.

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receptions, birthday parties and other such functions. The supper room and the main floor of the auditorium, which was used for the exhibition of motion pictures, were situated on the ground floor of the Town Hall and were separated from one another by a lobby which extended between them from a main entrance door to the entrances to the ladies' and men's cloakrooms and conveniences situated at the rear of the lobby. Entrances to both the auditorium and the supper room were provided by means of doors situated respectively on each side of the lobby, whilst the sweets stall referred to in the deed of 28th February 1950, was situated in the lobby itself. It should, perhaps, be added that the evidence, if not altogether silent, is quite uninformative as to the dimensions of the lobby, the supper room and the auditorium, nor is it helpful in determining the nature of the internal construction or acoustic properties of any part of the premises.

In August 1952, after a number of complaints had been made, the appellant instituted the suit which has led to this appeal. By his writ he claimed an injunction restraining the defendant for the period of the term created by the said deed or any renewal thereof from granting a lease or licence or other permission for the use of the supper room for the purpose of holding dances therein, or permitting dances to be held therein. In support of the claim for this relief the appellant alleged that functions conducted in the supper room on the nights upon which pictures were being exhibited by him gave rise to substantial interference with the use of his " demised " premises. Such interference, it was alleged, had been caused by the " great deal of noise " created by bands or orchestras playing dance music and by large numbers of persons passing to and from the supper room in and in the vicinity of the lobby and the sweets stall and the cloak rooms. Such interference, it was said, constituted a breach of an implied covenant that the defendant would not " cause or permit to be caused in or about the said premises any act, matter or thing which would disturb or interfere with the proper exhibition of motion pictures with sound tracks by the plaintiff upon the said premises, and that it should not permit any such disturbance or interference to be caused by persons using rooms in the Town Hall in the vicinity of the said premises ". Alternatively, it was claimed that the disturbance in question constituted a nuisance against which the appellant was entitled to the protection of the court.

It matters little whether the appellant's case is put on one ground or the other for, subject to one or two submissions made on behalf of the respondent, and to which reference will later be made, it is

clear that the appellant was entitled to some relief if the degree of interference deposed to in his case before the learned trial judge was actually established.

In his suit before the trial judge the appellant succeeded and obtained an injunction restraining the respondent from permitting or allowing dances to be held in the supper room " during the period of the lease thereof to the appellant or any extension thereof on nights on which the appellant is entitled to and is showing pictures in the theatre of the said Town Hall." But the circumstances in which the order was made were, to say the least, unusual. The hearing of the case, apart from the concluding addresses of counsel, took place at Shepparton, near Numurkah, and at the close of the evidence the learned trial judge visited the town hall for the purpose of viewing the premises and also for the purpose of witnessing and hearing a demonstration by an orchestra playing dance music whilst a motion picture was being exhibited in the auditorium. Thereafter the hearing of the case was resumed within a day or two in Melbourne and counsel made their submissions to the court. As may be supposed there had been considerable conflict between the evidence called to support the plaintiff's case and that called on behalf of the defendant as to the degree of interference caused by the holding of dances and other functions in the supper room. In support of his case the plaintiff tendered two recordings which had been made in the auditorium upon an instrument referred to as a tape recording machine. These recordings were made on occasions when motion pictures were being exhibited in the auditorium and whilst dancing was taking place in the supper room. They were, however, made after the institution of the suit and were not recordings of the noises made on any of the occasions complained of, though it was said that the conditions then prevailing were similar to those in respect of which the plaintiff complained and sought relief. But upon the evidence there is no real certainty that the instrument was capable of producing faithfully and in their true perspective sounds being made inside the auditorium and those penetrating from outside. Nevertheless, the trial judge felt that he should admit and hear the recordings and observed that he could treat them " as being evidence of . . . the kind of sounds that penetrated the auditorium without inquiring how accurate the instrument is in reproducing sounds ". At this stage counsel for the respondent intimated that the latter would prefer the judge to visit the town hall and witness " a practical demonstration ". His Honour apparently felt that this was a desirable course and suggested that when the demonstration was being arranged the

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respondent should " take the opposite side into consultation so that as far as can be you produce a sound which will be admitted to have some real likeness to the actions complained of ". Thereafter the recordings were played in court and after the close of the evidence the view and demonstration in the town hall in Numurkah took place. The cogency of what the trial judge there saw and heard is readily evident from his Honour's observations to counsel when the hearing was resumed in Melbourne. Before counsels' addresses commenced his Honour said : " I feel in difficulty about my view—I am not entitled to use that as evidence but only as a means of weighing the evidence. If at liberty to use it I would have no hesitation in saying that there was no interference, but I am not at liberty ". Again, in the course of his considered reasons his Honour subsequently said : " I was not much impressed by the evidence of the plaintiff himself, and if it stood alone I should be inclined to think that it was competition for patrons and not noise that was troubling him. On the other hand, he called evidence that was much more convincing, and, even discounting somewhat the mechanical reproduction in court of the sounds heard in the auditorium on two separate occasions, it much outweighed the negative evidence called for the defence. If I accepted such evidence, in my judgment it proved an interference quite serious enough to amount to a nuisance which entitled the plaintiff to relief, and if I confined myself to what I heard or read in court I was quite ready to accept it. What has troubled me was a visit I paid to the picture theatre after the evidence had all been given. A dance band had been installed in the supper room and a number of couples were dancing to it. I first went into the supper room where I did not observe in detail what instruments were being played, my attention being concentrated on the drummer. Of his participation nobody could be left in doubt. In the supper room he produced a din. In the foyer of the auditorium the music could be plainly heard and the sound of the drum was still loud. Inside the auditorium standing at the door opening into the foyer, I could still hear the music and more particularly the drum though not loudly enough to prevent me following without trouble the sound track of the picture that was being shown. With the door open when I moved a few yards away from it towards the stage I had to make an effort to catch the sounds from the supper room, and the same result followed from closing the door even when I was very close to it. In the dress circle also unless I listened consciously for it I was unaware of the music in the supper room. Were I at liberty to

treat this experience as evidence it would have destroyed my confidence in the plaintiff's evidence. I am aware of course that in some respects, in the number of persons dancing, for instance, perhaps in the number and nature of instruments played by the band, the circumstances may well have differed from those on the nights of which the defendant's witnesses spoke, but the drumming must have been a major part of the noise on all occasions, and, since I moved back and forth between the auditorium and the supper room to listen to the drum, first here and then there, I cannot believe that the band could possibly have been the nuisance which it was said to be. I think, however, that I am not entitled to treat my experience as evidence. A view is to be used merely to enable the tribunal to better understand and apply the evidence heard in court, (*London General Omnibus Co. Ltd.* v. *Lavell* (1); *Cole* v. *United Dairies* (*London*) *Ltd.* (2); *Smith* v. *Douglas* (3); *Kessowji Issar* v. *Great Indian Peninsula Railway Co.* (4)) but see also *Back* v. *Stacey* (5) and using it for that purpose it cannot, I think, enable me to reject the evidence that I would otherwise have accepted . . . I feel compelled therefore to decide this case on the evidence as I heard it with the result that the plaintiff must succeed ".

At this stage attention should be drawn to a number of features of the case. In the first place it is quite wrong to speak of what took place at the town hall as a view. It was considerably more than that. In addition to having a view of the premises his Honour saw and heard a demonstration of the nature already described and this, for all practical purposes amounted to the taking of evidence in the suit. In the circumstances of this case, it seems to us, such a course could only have been undertaken with the full consent and concurrence of both parties and, unhappily, on this point there is some degree of conflict between the parties which cannot wholly be resolved by recourse to the written transcript. Senior counsel for the appellant maintains that he objected that the proposed demonstration would not, and, he says, indeed could not, reproduce the conditions complained of and he did not himself attend the demonstration, though it is not suggested that his absence was intended as a refusal to take part in the demonstration. Junior counsel for the appellant, however, did attend and it is clear that both counsel and their client were aware of the time proposed for the demonstration and had a full opportunity of being present and seeing and hearing what took place. It is, however, equally clear

(1) (1901) 1 Ch. 135, at p. 139.
(2) (1941) 1 K.B. 100.
(3) (1855) 16 C.B. 31 [139 E.R. 665].
(4) (1907) 23 T.L.R. 530.
(5) (1826) 2 Car. & P. 465 [172 E.R. 210].

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that the demonstration was not, in one sense, the product of the joint action of the parties though the appellant must have collaborated to the extent of exhibiting a motion picture that evening. But at no time before the demonstration took place did a consultation, as suggested by the learned judge, take place and no evidence was thereafter given to establish that the conditions which were then produced were comparable with those complained of. It may, perhaps, be said that the course which his Honour took of excluding from his consideration his experience of the demonstration rather suggests that it did not take place with the complete concurrence and consent of both parties, but his Honour's attitude on this point was determined really by mistakenly regarding the demonstration merely as a view and by considering how far it is legitimate for a tribunal to take into consideration matters observed upon the view of a locus and not by considering whether the parties had agreed that an experiment or a demonstration should take place and form part of the material before the court.

It is, of course, quite clear that, acting pursuant to the provisions of O. 50, r. 3, of the Rules of the Supreme Court 1939, his Honour might have directed the making of an appropriate experiment but no such express direction was given. Nor, can it be said, did the course pursued by his Honour amount to the giving of a direction pursuant to this rule for the form of the demonstration or experiment was left by him to be arranged in consultation between the parties and, no such consultation having taken place, was left substantially in the hands of one party.

Another feature of importance is that it is quite clear that, in the absence of the view and demonstration, the plaintiff would unquestionably have succeeded whilst it is equally certain that if his Honour had been at liberty to give weight to the knowledge gained upon the demonstration the plaintiff, upon the evidence as it then stood, would have failed. It was, in effect, the latter proposition which led the Full Court to set aside the order originally made and enter judgment for the defendant. In the course of his reasons *Lowe* A.C.J., with whom *Barry* and *Dean* JJ. agreed, said: "The learned judge, in his view of the locus saw the relative positions of various parts of the building, he heard the instruments which were said to create the noise and he was able on his inspection to form an opinion of these instruments and the other noises and to what extent they penetrated into the auditorium where the noise was said to create a nuisance. It would be strange indeed if the learned judge, having obtained that knowledge with the acquiescence of the parties should be left in the position that he was quite unable

to use it. If that were so, the learned judge would have been asked to be a party to a futility. The learned judge felt himself in a difficulty with regard to the result of his view. It was agreed between the parties that before the argument started the learned judge said ' I feel in difficulty about my view—I am not entitled to use that as evidence but only as a means of weighing the evidence. If at liberty to use it, I would have no hesitation in saying that there was no interference, but I am not at liberty '. The judge, after having heard argument, in his judgment said, ' Were I at liberty to treat this experience as evidence it would have destroyed my confidence in the plaintiff's evidence '. A little later, he said, referring to one source of noise, ' I cannot believe that the band could possibly have been the nuisance which it was said to be '. The learned judge later said, ' I feel compelled therefore, to decide this case on the evidence as I heard it, with the result that the plaintiff must succeed.' His Honour quite plainly expressed himself that he was not able to use the results of his view for the purpose of determining the credibility of the evidence before him. That evidence was in two bodies and was in complete conflict. We think whatever may be the limits of the use which a judge's or jury's view may have on the determination of the case the judge is clearly at liberty to use the results of that view for the purpose of determining the credibility of two conflicting bodies of evidence. Mr. *Reynolds* argued forcefully that there was no agreement that his Honour should use as evidence the result of his view, and therefore, that he could pay no attention to it. There is a distinction we think between the judge introducing into the case new evidence which does not appear in the testimony already given and using his view for the purpose of determining the credibility of conflicting bodies of evidence. We have taken the opportunity of speaking to the learned judge to see if we have misinterpreted his views as expressed in his judgment and he has confirmed the position that had he been at liberty to use the results of his view for the purpose of determining the credibility of the two bodies of evidence he would have rejected the plaintiff's evidence and determined the case for the defendant. It must be borne in mind, too, that his lack of confidence in the plaintiff's evidence—quite apart from his accepting the defendant's evidence—may well have been sufficient to defeat the plaintiff's claim. If the learned judge finally found himself in the position that he was not prepared to accept the plaintiff's evidence, the plaintiff should fail whether he accepted the defendant's evidence or not. But the judge's view, as communicated to us, is that had he been at liberty

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to accept the results of his own experience he would have accepted the defendant's evidence and rejected the plaintiff's. For these reasons we think the judge was wrong in the view that he took and that had he acted on the result of his own view the result must have been a decision for the defendant ".

Of course, if the demonstration took place at the request of or with the complete concurrence of both parties the case would present no difficulty. But in our view such a conclusion cannot safely be reached. There seems to be no doubt that the objection was raised that it was quite possible that the demonstration would not faithfully reproduce the conditions complained of and that there was no prior consultation between the parties as was suggested. Whether at the time the demonstration took place the learned trial judge was aware of the latter circumstance does not appear, but the fact that the parties had not acquiesced and did not acquiesce in the demonstration being regarded as part of the material before the court became only too clear when the hearing was resumed in Melbourne. In these circumstances it is apparent that the order of the Full Court can find no firm foundation in the proposition that the knowledge obtained by the learned trial judge during the course of the demonstration was obtained " with the acquiescence of the parties " or, indeed, at their request. If that proposition were established we would readily agree that this appeal should be dismissed, but there are so many features in the case tending to show that never at any time was there any real acquiescence in the demonstration being regarded as part of the material before the court that the contrary inference cannot be drawn. Indeed, perhaps it should be said, the conclusion should not be reached that there was agreement between the parties that the demonstration should be so regarded or that the appellant acquiesced in the course being adopted in the absence of compelling evidence that this was so. There is, of course, a complete absence of any such evidence.

But upon examination, the reasons of the Full Court do not appear to be based upon this conclusion. The reasons of that court refer to the fact that upon inquiry of the learned trial judge he had intimated to the Full Court that " had he been at liberty to use the results of his view for the purpose of determining the credibility of the two bodies of evidence he would have rejected the plaintiff's evidence and determined the case for the defendant " and that court thought that the learned trial judge was clearly at liberty " to use the results of that view for the purpose of determining the credibility of two conflicting bodies of evidence ". There was,

they thought, " a distinction . . . between the judge introducing into the case new evidence which does not appear in the testimony already given and using his view for the purpose of determining the credibility of conflicting bodies of evidence ". It is, of course, clear that the legitimate use of a view may greatly assist in deciding between two conflicting bodies of evidence. But to say that a view may serve such a *purpose* gives no real clue to the manner in which, for this purpose, a tribunal may derive assistance from a view. The limits of the use which may be made of a view are well stated by *Davidson* J. in *Unsted* v. *Unsted* (1) where he said : " Whilst a view is frequently a valuable adjunct to a hearing to enable the truth to be elicited, there are well-recognised limits within which such a procedure must be kept. The subject has been discussed recently by the Full Court in *Hodge* v. *Williams* (2). In a general form the rule is that a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence : *London General Omnibus Co. Ltd.* v. *Lavell* (3). Yet, sometimes, for example, in cases of passing off, or otherwise when what appears to the eye is the ultimate test, the Judge, looking at the exhibits before him or examined by him as if they were exhibits in the case, and also paying attention to the evidence adduced, can apply his own independent judgment notwithstanding what witnesses have deposed to on the particular point : cf. *Bourne* v. *Swan & Edgar Ltd.* (4) ; *Payton & Co.* v. *Snelling, Lampard & Co.* (5). It is not permissible, however, for the Judge to gather anything in the nature of extraneous evidence and apply it in the determination of the issues unless the facts are openly ventilated and exposed to the criticism of the parties : *Way* v. *Way* (6) ; *Kessowji Issar* v. *Great Indian Peninsula Railway Co.* (7) " (8). The statement that " the rule is that a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence " is fully supported by authority. In the United States the rule appears to be wider (see *Wigmore* on *Evidence*, 3rd ed. (1940), pp. 264 et seq.) but there is no warrant for an extension of the rule so well established in this country.

(1) (1947) 47 S.R. (N.S.W.) 495 ; 64 W.N. 183.
(2) (1947) 47 S.R. (N.S.W.) 489 ; 64 W.N. 201.
(3) (1901) 1 Ch. 135, at p. 139.
(4) (1903) 1 Ch. 211, at p. 224.
(5) (1901) A.C. 308, at p. 311.
(6) (1928) 28 S.R. (N.S.W.) 345, at p. 347 ; 45 W.N. 101.
(7) (1907) 23 T.L.R. 530.
(8) (1947) 47 S.R. (N.S.W.), at p. 498 ; 64 W.N. 183.

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As we have already said the learned trial judge not only had a view of the locus but he also witnessed an experiment or demonstration. Nevertheless, this dual event has been consistently referred to by him as a view and the same error has been carried forward into the reasons of the Full Court. Now it is clear that within proper limits it was permissible for the learned trial judge to use the view which he had of the locus to assist him in deciding the issues involved but, for the reasons already given, he was not at liberty to use the conclusions which he formed or the impressions which he gained as the result of the joint view and demonstration which took place. With these considerations in mind the reasons of *Lowe* A.C.J. appear to us to be open to valid criticism on at least two points. In the first place, although the learned trial judge was at liberty to use " the results of his view for the purpose of determining the credibility of conflicting bodies of evidence ", he was at liberty to make use of the view only within the limits and subject to the principle already indicated and it is by no means clear that his Honour's determination of the issues on the oral evidence would have been substantially influenced if he had so restricted himself. Secondly, the objection apparent on the statement of this proposition assumes insuperable proportions when it is borne in mind that in speaking of the *purposes* for which a view may be used both the learned trial judge and the Full Court intended, by the expression " view ", a reference to both the view and the demonstration. Clearly, the learned trial judge was not, in the absence of the agreement between the parties and in the absence of an appropriate direction under O. 50, r. 3 of the Supreme Court Rules 1939, entitled to take into account the impressions formed by him during the course of or as a result of the demonstration.

Accordingly we are of the opinion that the order of the Full Court cannot stand. But it does not follow that the decision of the learned trial judge must be restored for there seems to be considerable doubt as to how far the findings which his Honour was prepared to make upon consideration of the oral evidence alone might have been affected by a legitimate use of the view which he had. Indeed, from what has already been said this appears to us to be a matter of speculation and in these circumstances we are firmly of the opinion that this Court should not attempt finally to decide the matter upon the evidence as it stands at present. Accordingly, loath as we are to come to such a conclusion in a case such as the present, we are of the opinion that the interests of justice can be served only by ordering a new trial of the issues between the parties.

Before leaving the case we should refer briefly to two other matters which were adverted to by counsel for the respondent. The first of these was a submission based on the observations of their Lordships in *Lyttelton Times Co. Ltd.* v. *Warners Ltd.* (1). It is, we think, sufficient to say that the reasons which in that case led their Lordships to their conclusion have no application whatever to the present case. The other of these matters was a submission that the respondent is not liable for the nuisance, if any, created by its licensees. The submission is now made for the first time in the litigation and for obvious reasons this Court should not entertain it. If there is any substance in it at all the relevant issues may be determined upon appropriate evidence in the new trial.

FULLAGAR J. I agree with the judgment which has been delivered, but I wish to add a few words.

The visit of the learned trial judge to the Town Hall involved, of course, a "view" by his Honour of the *locus* in which took place the events which had been described to him in the evidence given in court. But it involved a very great deal more than a view, and it is not in its character of a view that it has assumed major importance in the case.

In so far as his visit amounted to a "view", his Honour was clearly entitled, and indeed bound, to make use, within the limits which have been judicially laid down, of what he saw. With regard to those limits, I agree, with respect, that they are well stated by Sir *Colin Davidson* in the passage quoted above from *Unsted* v. *Unsted* (2) a case which itself affords a very good example of a misuse of a view. In the present case, inspection of the premises and observation of the auditorium, the foyer, and the supper room, their dimensions, their situation relatively to one another, the position of doors and other openings, and perhaps other things seen, might well have assisted his Honour to understand and weigh the oral evidence which had been given before him. To use what he saw as providing such assistance would have been legitimate and proper.

It was, however, a different matter altogether when his Honour was faced with the problem of what use he could or should make of what he had heard, as distinct from what he had seen. At this point authorities relating to the use to be made of a view become wholly irrelevant. For what his Honour was really being asked

(1) (1907) A.C. 476.

(2) (1947) 47 S.R. (N.S.W.) 495, at p. 498; 64 W.N. 183.

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by the defendant to do was to treat what he heard as a demonstration or reproduction of what the witnesses had described to him in court. It seems clear to me that he could properly do this only in one or other of two events. He could do it if the parties specifically admitted that the demonstration was, or agreed that it should be treated as, a reproduction of what the witnesses had attempted to describe. Or he could do it if it were proved by evidence to his satisfaction that the demonstration really did reproduce what the witnesses had attempted to describe.

The first event did not occur. Counsel for the plaintiff certainly never agreed or admitted that the demonstration reproduced what was complained of. He was entitled, when the demonstration was proposed, to say: "You can stage your demonstration if you like, and his Honour can go and listen to it if he likes, but I admit nothing, and I agree to nothing." This is, I think, what he did in effect say.

Nor did the second event occur. There was no evidence that the demonstration reproduced what the plaintiff complained of. I should have thought indeed that, in the absence of agreement or admission, very great difficulty would be experienced in satisfying any tribunal that any such demonstration could provide a satisfactory or reliable means of testing the plaintiff's case. The learned trial judge at one stage, I think, realized this, for he seems to have thought that the parties might co-operate in arranging a demonstration. Sincere co-operation would obviously be difficult to achieve in a case like the present, and in its absence it could not be easy for a court to feel assured that any demonstration was very reliable. The case is very different from a case in which a nuisance is said to be created by the normal working of a particular machine, such as a printing press. In the case of such a machine there is no inherent difficulty in ensuring that it is normally working when a judge or jury is invited to visit the plaintiff's premises and listen to it. In a case like the present, whether the claim is based on derogation from grant or framed in tort, the essence of the complaint is that persons who go to a place in order to listen to one series of sounds are incommoded and disturbed by an alien series of sounds produced in the vicinity. Everything depends on the relation of the one series to the other, and this is practically certain to change radically not merely from evening to evening but repeatedly from time to time during a single evening. The strains of a lilting waltz may make no impression on the hero or villain of a raucous and boisterous drama, whereas the pathos of a heroine with a voice like Cordelia's

may be murdered by an unholy conspiracy of saxophone and drum. And between these extremes lies a great variety of possibilities. I would only add that the learned trial judge, in considering what he heard in the auditorium, seems to me to have been disposed to apply a standard too favourable to the defendant. His Honour said that in the auditorium he could still hear the music and more particularly the drum, though not loudly enough to prevent him from following without difficulty the sound track of the picture which was being shown. I should have thought it by no means necessary for the plaintiff to show that the music made it impossible or difficult to hear the voices reproduced by the sound track. The music, " and more particularly the drum ", might fall far short of doing that, and yet amount to an annoying distraction such as to impair substantially the comfort and enjoyment of a not hypersensitive theatre-goer. If such an impairment were shown, the plaintiff would, in my opinion, on the test laid down in *Walter* v. *Selfe* (1) establish what it was necessary for him to establish.

The judgment of the Full Court cannot, to my mind, be upheld so far as it orders that the plaintiff's action be dismissed. I have felt some difficulty, however, as to whether that part of the judgment which discharges the judgment of *Gavan Duffy* J. ought or ought not to stand. If it does stand, the only possible course is to order a new trial, a course which one is most reluctant to take. If it does not stand, the original judgment in favour of the plaintiff will be restored. I was at one time inclined to think that that original judgment ought to be restored. *Gavan Duffy* J. says that he was prepared to accept the evidence of the plaintiff's witnesses before he visited Numurkah. After visiting Numurkah he disbelieved that evidence, but thought nevertheless that he ought to act on it. The demonstration at Numurkah did not, as we hold, justify disbelieving evidence otherwise regarded as credible. May it not then be said that his Honour was right in acting on the evidence of the plaintiff's witnesses, although the reasons which he gave for so doing were not sound ? I do not think, however, that it would be right for this Court to act on this basis. It is an inescapable fact that the judgment is based on evidence which the learned judge said that he did not accept. Whatever may be thought of the reasons given for disbelief, it is impossible to regard a judgment so based as satisfactory or sound. Moreover, it must be borne in mind that his Honour was not bound to put entirely out of his mind all knowledge gleaned at Numurkah, and it is impossible for

(1) (1851) 4 De G. & Sm. 315 [64 E.R. 849].

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us to say that his view of the evidence could not have been legitimately affected by what he saw there and might properly have taken into consideration. I can see no escape from the necessity of ordering a new trial.

Appeal allowed with costs. Order of the Supreme Court of 11th August 1953 discharged. In lieu thereof order that the judgment pronounced by Gavan Duffy J. on 16th December 1952 and 8th January 1953 be discharged and that a new trial of the action be had between the parties and that the costs of the former trial be dealt with by the judge before whom such trial is had and that the plaintiff pay the defendant's costs of the appeal to the Full Court of the Supreme Court. Declare that the costs payable by the plaintiff of the appeal to the Full Court of the Supreme Court and the costs payable by the defendant of the appeal to this Court ought to be set off. Liberty to apply to this Court for an order giving effect to such set off and execution under the order for costs stayed subject to further order accordingly.

Solicitors for the appellant, *K. A. Evans*, Cobram, by *Morrison, Sawers & Teare.*

Solicitors for the respondent, *S. W. E. Stife*, Numurkah, by *Paul C. Nunan.*

R. D. B.